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No. 92-

In the Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress preempt state consumer protection laws regulating late charges and other non-interest loan fees when it expressly preempted interest rate restrictions on state chartered banks through Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980?

2. After finding that the text and legislative history of an express preemption statute are "at bottom inconclusive" as to preemptive scope, may a court then define the preemptive scope broadly so as to find preemption?

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GREENWOOD TRUST COMPANY,
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PETITION FOR A WRIT OF CERTIORARI
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The Commonwealth of Massachusetts and the Attorney General of Massachusetts petition for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit, entered in this case on August 6, 1992.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 971 F.2d 818 and is reproduced as Appendix A

hereto. The decision of the United States District Court for the District of Massachusetts is reported at 776 F. Supp. 21 and is reproduced as Appendix C hereto. The final judgment under Fed. R. Civ. P. 54(b) and the "Supplement to the Court's Memorandum and Order of October 22, 1991" of the United States District Court are reproduced as Appendices B and D hereto, respectively. Appendices A-D are included in a separate Appendix.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on August 6, 1992. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1) (1988). The respondent invoked District Court jurisdiction under 28 U.S.C. §§1331, 1332 and 1337.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

12 U.S.C. §1831d(a) (1988 & Supp. 1990) provides, in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may,

> notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

Mass. Gen. Laws Ann., ch. 140, §114B (West 1991) provides, in pertinent part:

> No creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to such an open end credit plan.

STATEMENT OF THE CASE

The facts giving rise to this controversy are undisputed. Greenwood Trust Company ("Greenwood"), a Delaware

state bank insured by the FDIC, issues the Discover Card to customers nationwide, including several hundred thousand Massachusetts residents. In addition to charging a monthly periodic rate of 1.65%, Greenwood imposes a $10.00 "late charge" if a required payment is not made within 20 days after the monthly payment due date. A Massachusetts consumer protection statute, Mass. Gen. Laws Ann., ch. 140, §114B (1991), prohibits credit card late charges. App. A - 6, 7.

On October 27, 1989, the Attorney General of Massachusetts sent written notice to Greenwood that Greenwood's imposition of late charges on its Massachusetts Discover Card customers violated the Massachusetts statute. Greenwood then filed a Complaint for Declaratory and Injunctive Relief in the

U.S. District Court for the District of Massachusetts, alleging that Delaware law allowed the imposition of credit card late charges on Massachusetts consumers, and that the Massachusetts statute was preempted by the Supremacy Clause of the United States Constitution and by Section 521 of the Depository Institutions Deregulation and Monetary Control Act ("Section 521" and "DIDA").[1/]

1/ Greenwood also alleged that its late charges did not violate the Massachusetts statute and that, pursuant to a choice of law provision in its Cardmember Agreement, more permissive Delaware law controlled its contractual relationships with its Massachusetts customers. Those allegations, which were rejected by the District Court in its Memorandum and Order of October 24, 1991 (App. C - 126), were not addressed by the Court of Appeals (App. A - 55), and are not at issue in this petition.

In its Answer and Counterclaim, Massachusetts denied that its late charge statute was preempted by federal law and asked the District Court for civil penalties and restitution of the late charges illegally collected.

On cross-motions for summary judgment, the District Court ruled in favor of the Commonwealth stating that Greenwood had not met its heavy burden of showing preemption. App. C - 84. The District Court held that "[t]he plain meaning of section 521 does not evince Congressional intent to preempt state regulation as to other credit terms, apart from interest rates, such as the late charges challenged by Massachusetts." App. C - 22,23. The court also noted that "[t]he record of Congressional debate and deliberation

concerning the enactment of DIDA is generally supportive of the Commonwealth's argument that preemption of credit card regulation under DIDA is confined to numerical interest rates." App. C - 33.

The District Court certified its rulings for Greenwood's interlocutory appeal under 28 U.S.C. §1292(b) (1988). The First Circuit accepted the certification, noting:

> In light of the pivotal importance and broad commercial consequence of the questions presented, we accepted the certification. (As an aside, we remark that our belief as to the importance of the questions presented has been validated to some degree by the outpouring of amicus briefs, some favoring appellant's position and some opposing it.) App. A - 8.

On August 6, 1992, the First Circuit reversed the District Court.

The First Circuit found the statute's "text and legislative history . . . at bottom, inconclusive." App. A - 41. The court went on to hold that the preemptive reach of DIDA goes beyond numerical percentage rates of interest, and preempts Massachusetts' law prohibiting credit card late charges.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S OPINION MAY HAVE A DRAMATIC IMPACT ON THE TRADITIONAL STATE REGULATION OF LENDING PRACTICES.

The First Circuit's opinion, if allowed to stand, may result in the preemption of much state regulation of lending practices. Even the narrowest reasonable reading of the First Circuit's holding affects the allocation between consumers and the banking industry of hundreds of millions of dollars in late charges annually.

The First Circuit's ruling may place most loan-related charges beyond the reach of state regulation.[2/] States have, in fact, historically regulated many of these charges.[3/]

2/ The court's statement that a late charge is "related to the use or forbearance of money, or . . . damages for its detention", App. A - 25, 26 (emphasis added), implies that any state restriction of loan related charges affecting a lender's total return is preempted under §521. For example, charges for exceeding the credit limit, replacement card fees, and charges for duplicate statements are arguably all "related to" the use or forbearance of money (at least under the First Circuit's expansive reading of §521), "interest," and therefore exportable, regardless of the law of the cardholder's state. This analysis could also lead to the preemption, for example, of limitations on attorney's fees under state law.

3/ For example, Washington, since 1899, has restricted loan "setup charges." Wash. Rev. Code Ann. § 19.52.020 (Supp. 1992). New Mexico, since 1912, has restricted loan commissions. N.M. Stat. Ann. §56-8-7 (1978). South Carolina, since 1962, and Louisiana, since 1988, have restricted over-limit charges.

(footnote continued)

The First Circuit's opinion will encourage more and more lenders to flout long-standing state consumer protection laws. As state law enforcement officers attempt to fulfill their legitimate roles, they will be met by declaratory judgment actions citing Greenwood Trust.

Even read as limited to its facts, the First Circuit's opinion is of national importance. It holds that section 521 of DIDA preempts state regulation of late charges in open-end credit agreements with out-of-state banks and allows interstate

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(footnote continued)

S.C. Code Ann. §37-2-202(c)(ii) (Law Co-op. 1991); La. Rev. Stat. Ann. §3530(E) (West 1991). Congress recognized the state's historic role in this type of regulation when it passed the Truth in Lending Act -- a comprehensive scheme of lending regulation far broader than the usury deregulation in s.521. Aldens, Inc. v. Packel, 524 F.2d 38, 46 (3d Cir. 1975), cert. denied, 425 U.S. 943 (1976).

"exportation" of late charge deregulation. Given that most open-end credit agreements now cross state lines and originate from bank entities domiciled in low-regulation states,[4/]

4/ "Credit card loans at commercial banks in the United States increased by $72.4 billion from 1980 to 1987. Just two states accounted for half of that increase -- Delaware for $25.0 billion and South Dakota for $12.3 billion." See "Small States Teach a Big Banking Lesson," Chicago Fed Letter, June 1986. To achieve this result, the states repealed all consumer protection legislation applicable to consumer lending. In 1980, South Dakota removed all usury ceilings for credit card loans and other types of consumer lending. In 1981, Delaware eliminated interest rate ceilings on all types of loans and passed laws allowing banks to charge a variety of fees associated with the extension of credit. Id. See App. C-20.

The ten largest holders of bank card receivables hold 50.9% of the market share. Of the 10 largest holders of bank card receivables, six are located in Delaware and one is located in South Dakota. The six Delaware banks accounted for approximately 26% of the total bank card receivables in 1991; the one South Dakota bank accounted for

(footnote continued)

the result of this holding, in effect, is that states may no longer regulate late charges.

This derogation of the states' historically accepted police powers will have a very significant economic impact. Today, 32 states, as well as Puerto Rico and the District of Columbia, prohibit or significantly restrict credit card late charges. Six

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(footnote continued)

approximately 18%. Credit Card Management, Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States, 1992 ed., at 35, 68-72. Clearly, the residents of these two states, with populations of 594,000 and 708,000, ranking 47th and 45th in population size, respectively, do not account for these receivables. U.S. Department of Commerce, A Statistical Abstract Supplement: State and Metropolitan Area Data Book, 1986, 1986, at 504.

states prohibit late charges,[5] 24 states plus the District of Columbia and Puerto Rico impose percentage and/or total dollar limitations on such charges,[6]

5/ COLO. REV. STAT. §5-3-203NJ(5)(a) (1992); MASS. GEN. LAWS ANN. ch. 255, §12H (West 1988); N.J. STAT. ANN. §17:16C-50 (West 1984); 69 PA. CONS. STAT. ANN. §1906 (Purdon SUPP. 1992); TEX. REV. CIV. STAT. ANN. art. 5069-15.02(f), 3.15(8), 3.16(3) (Vernon 1987); VT. STAT. ANN. tit. 9, §2406(c) (1987)).

6/ ARIZ. REV. STAT. ANN. §44-6002G (SUPP. 1991); CONN. GEN. STAT. ANN. §§36-233(d), 36-233b (SUPP. 1992); D.C. CODE ANN. §28-3310 (1990); FLA. STAT. ANN. §520.35 (West 1988); GA. CODE ANN. §10-1-7 (1989); HAW. REV. STAT. §476-9 (1985); IND. CODE ANN. §24-4.5-3-203.5 (Burns 1991); IOWA CODE ANN. §537.2502(4) (West SUPP. 1992); KAN. STAT. ANN. §16a-2-502 (1988); KY. REV. STAT. ANN. §287.750 (Michie/Bobbs-Merrill 1988); LA. REV. STAT. ANN. §9:3527 (West 1991); ME. REV. STAT. ANN. tit. 9A, §§2-402, 2-501(3), 2-502 (SUPP. 1991); MD. COM. LAW CODE ANN. §12-506(6) (1990); MINN. STAT. ANN. §§48.185(d), 168.71(a)(3) (West SUPP. 1992); MISS. CODE ANN.

(footnote continued)

and two states specifically require such charges to be reasonable.[7/]

More than 79 million Americans hold one or more credit cards.[8/] Three-quarters of cardholders are "borrowers" who pay interest (finance) charges on their outstanding balances on

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(footnote continued)

§75-17-19(3) (1991); MO. ANN. STAT. §408.330(3) (Vernon SUPP. 1992); MONT. CODE ANN. §31-1-235 (1991); NEV. REV. STAT. §97.195 (1987); N.C. GEN. STAT. §24-11(d1) (1991); P.R. LAWS ANN. art. 19(B); S.C. CODE ANN. §37-3-203 (Law. Co-op. 1987); S.D.CODIFIED LAWS ANN. §54-6-61 (1990); UTAH CODE ANN. §70C-2-102 (SUPP. 1992); VA. CODE ANN. §6.1-330.80 (1988); W.VA. CODE §46A-3-113 (1992); WIS. STAT. ANN. §422.202(2m)(a) (1988)).

7/ CAL. CIV. CODE §1671(c)(d) (West 1985) interpreted in Beasley v. Wells Fargo Bank, N.A., 1 Cal. Rptr. 2d 446, 235 Cal. App. 3d 1383 (1991) review denied (Mar. 1992) (credit card late fees charged by National Bank were unreasonable in amount) and WASH. REV. CODE ANN. §63.14.090 (SUPP. 1992).

8/ The Nilson Report, Nov. 14, 1991 at 4.

a monthly basis.[9/] In 1991, those borrowers paid finance charges at an average annual rate of approximately 18%, although these rates have declined in recent months.[10/]

Sixty five percent of banks charge late fees to customers. These fees average over $8.00 per month.[11/] In 1991, credit card issuers billed to and received from consumers $858 million

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9/ See Ausubel, "The Failure of Competition in the Credit Card Market," The American Economic Review, March, 1991, at 71.

10/ See Credit Card Management, Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States, 1992 ed, at 35, 37.

11/ Stewart, "How Penalty Fees are Rewarding Banks," Credit Card Management, Nov. 1991, p.39.

in late charges.[12/] (It is safe to assume that a material share of these late charges are collected in apparent violation of the state law of the cardholder.)

Summarizing, millions of credit card customers pay late charges as well as high interest rates on their unpaid balances when they cannot or do not make

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12/ Business Week, Feb. 24, 1992 at 32. In 1981, there was $31.8 billion in outstanding debt on bank credit cards. See Credit Card Management, Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States, 1992 ed. at 26. By 1992, that figure had grown more than six times to $189 billion; the average outstanding balance on the major credit cards exceeds $1200. See New York Times, Business, September 13, 1992, at 13, citing Ram Research Corporation. Credit cards are now used to charge more than $200 billion for goods and services per year. The Nilson Report, Nov. 14, 1991, at 5. Credit cards also generated approximately $34.24 billion in revenues for the banking industry and $5.83 billion in pre-tax profits. Id.

timely monthly payments. Thirty two state legislatures have seen fit to strike a better balance between the average consumer and the credit card industry. The First Circuit's holding would void the thoughtful decisions of these policy-making bodies. The need for this Court's review is reinforced by pending litigation potentially affected by this ruling.[13/]

The First Circuit has broadly expanded the preemptive scope of DIDA. The logic and language of the First Circuit's opinion suggests that not only

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13/ The Commonwealth is aware of more than 20 actions, most of which are class actions, pending in seven jurisdictions, which turn on the resolution of the questions presented in this case. See Laing v. U.S., 423 U.S. 161, 167 (1976) (Solicitor General did not oppose petition for certiorari because 70 pending federal tax cases depended on resolution of conflict).

late charges, but many other loan-related charges and terms are now beyond the reach of state regulation. This interpretation would represent an extraordinary incursion on state law and state authority and may significantly alter the state/federal balance in banking regulation.

II. THE FIRST CIRCUIT'S DECISION DISREGARDED THE PLAIN LANGUAGE AND UNAMBIGUOUS LEGISLATIVE HISTORY OF DIDA.

The plain language of DIDA §521 allows federally insured state-chartered banks to export the "interest rate" ceiling of their home states to foreign states.[14/]

14/ The language of DIDA §521 is similar to the language of §85 of the National Bank Act, 12 U.S.C. §85 ("§85"). This Court held in Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) that national banks could disregard other states' interest ceilings when doing business outside their home states.

Section 521 of DIDA reads in pertinent part as follows:

> [I]f the applicable rate prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, . . . charge on any loan . . made . . . interest at [a federal ceiling] rate . . . or at the rate allowed by the laws of the State,... where the bank is located, whichever may be greater.

12 U.S.C. §1831d(a) (1988 & Supp. 1990).

Congress, in the language of §521, expressed its preemptory intent. The scope of that preemption is clearly limited to "interest." There is no expressed intent to reach beyond "interest" to deregulate late charges and other loan fees.

> The question at bottom is one of statutory intent, and we accordingly "begin with the language employed by Congress and the assumption that the

> ordinary meaning of that language accurately expresses the legislative purpose."

Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2036 (1992) (quotation marks and citations omitted).

The straightforward -- "interest" means interest -- reading of the statute, which the District Court correctly applied, is consistent with the legislative history of DIDA. In 1980, Congress faced a very clear problem, and, in DIDA, crafted a very focused, simple solution. Before the Act, less-regulated deposit-taking institutions -- especially money market funds -- and the capital markets generally were offering extremely high interest rates on deposits and other fixed income investments. Many state banks were unable to offer competitive

rates for two reasons: (1) federal regulations limited the maximum interest rates state banks could pay on deposits; and (2) state usury laws limited the interest rates state banks could charge on loans. The usury laws reinforced the effect of the deposit rate regulations by making it unprofitable to offer competitive rates on deposits. The final result, very destructive to local economies, was that it was impossible for many state banks to make loans -- lack of cash in-flow on the deposit side (as a result of uncompetitive rates) made cash out-flow on the loan side impossible.

To solve this problem, Congress raised the legal ceilings on both

deposit and loan interest rates.[15/]

15/ In DIDA, Congress changed the financial system in "three particularly critical ways":

> The high interest rates available to savers from money market funds, certificates of deposits, and other instruments has sharply discouraged passbook savings accounts for those who can afford an alternative, and left the small saver dependent on his passbook account severely discriminated against. This bill will phase out interest rate ceilings to give small savers a better break and to encourage savings. At the same time it will broaden the services available from thrift institutions, and expand their opportunities for improving earnings.
>
> Usury ceilings in some 24 States have left lenders unable to lend and borrowers unable to borrow, diverting credit availability out of these states and distorting the economy in myriad ways. The bill lifts usury ceilings to reflect the realities of the marketplace and makes it possible for banks and thrift associations to continue necessary lending. The provisions protect States' rights by allowing States to restore the usury ceiling promptly if they wish to do so.

(footnote continued)

Title II of DIDA deregulated deposit interest rates; Title V deregulated loan interest rates. Each section of Title V deregulates rates for a particular type of loan. Section 521, in particular, deregulates loan interest rates for state chartered banks. It does not preempt late charges or other incidental loan charges. An analytic reading of §521 in conjunction with other sections of Title V and their legislative histories reinforces the conclusion that late charges are not preempted by §521. See the District Court's opinion in this case, App. C- 21 to 50.

Massachusetts' ban on late charges in no way "interferes with or is

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(footnote continued)

126 Cong. Rec. 6965 (March 27, 1980). Remarks of Rep. Henry S. Reuss, Chairman, Committee on Banking, Finance and Urban Affairs.

contrary to federal law" or Congress's purpose. Gade v. National Solid Wastes Management Association, 112 S.Ct. 2374, 2388 (1992). Massachusetts' late charge law does not limit Greenwood's abilities to charge and earn high interest rates on its loans, or to pay competitive rates on its deposits, or to supply adequate credit to the economy.

The Massachusetts prohibition against credit card late charges, enacted in 1981,[16/] does not limit bank interest income. It is a consumer protection law designed to bar what the Massachusetts legislature viewed as an

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16/ Mass. Gen. Laws Ann. ch. 140, §114B, amended by Mass. Stat. 1981, ch. 384, §1. See App C - 101 to 116.

unfair and deceptive practice.[17/] The Massachusetts statute was not preempted by Congress in DIDA.

Nonetheless, the First Circuit determined that Congress intended to preempt late charge laws. The First Circuit's fundamental error was to read state and federal cases applying usury laws as a guide to Congress's preemptive intent in enacting §521. Finding the

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17/ Massachusetts Representative Antoine Aguiar, Chairman of the Massachusetts Joint Committee on Banks and Banking, refers to late fees and similar fees as "the notorious hidden charges that we have fought for years to eliminate." State House News Service, October 26, 1981. App. C - 116. Consumers shopping for credit are often unaware of differences in late fee practices, because they do not intend or expect to make late payments. See Statement of Basis and Purpose for FTC Trade Regulation Rule Concerning Credit Practices, 16 C.F.R. 444 (49 Fed. Reg. 7789, March 1, 1984). Credit card advertising and marketing do not focus on late fees except when required by law. See 1988 Fair Credit and Charge Card Disclosure Act, 15 U.S.C. §1637.

statute and legislative history unclear, and finding no case law directly addressing the issue of whether late charges or other loan fees are preempted by §521 or §85 of the National Bank Act (12 U.S.C. §85),[18] the court turned to a completely distinct line of cases, cases analyzing how interest should be computed for the purpose of applying usury laws. Courts in these cases often broadly interpreted "interest" to cover a wide variety of charges.[19]

18/ The court did reference a recent preliminary late fee decision under the National Bank Act in Nelson v. Citibank, 794 F. Supp. 312, 318 (D. Minn. 1992). See also Hill v. Chemical Bank, Civ. Nos. 3-92-255, 3-92-387 (D. Minn. Aug. 4, 1992) and Tikkanen v. Citibank (South Dakota), N.A., Civ. Nos. 4-92-286, 4-92-287 (D.Minn. Sept. 10, 1992).

19/ In fact, many of these cases do not really stand for a broad definition of "interest" even in usury computation. For example, in Fisher v. First National

(footnote continued)

(footnote continued)

Bank, 548 F.2d 255 (8th Cir. 1977), the Eighth Circuit never decided the issue of whether a cash advance transaction fee was "interest." Instead, the Court of Appeals simply determined that a Nebraska bank was entitled to charge interest on its credit card accounts at the rate permitted to Nebraska small loan companies. The small loan interest rate was high enough to make the fee irrelevant. Similarly in Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855, 864 (6th Cir. 1972), the Sixth Circuit, in allowing a national bank operating in Michigan to impose front-end closing costs in conformity to Michigan state law governing state banks, did not consider or decide whether those charges were "interest." The Sixth Circuit also accepted the view that prepayment penalties, another form of post-transaction charges heavily regulated by states (see, e.g., Mass. Gen. Laws Ann. Ch. 255D §13 (West 1988)), are not interest and cannot make a nonusurious loan usurious. Id. Likewise, the opinion in First National Bank in Mena v. Nowlin, 509 F.2d 872 (8th Cir. 1975) did not offer an expanded definition of the term "rates," but merely deferred to state usury case law. But see National Bank v. Johnson 104 U.S. 271, 277 (1881); Evans v. National Bank, 251 U.S. 108 (1919). Also, for example, in American Timber & Trading Co. v. First National Bank, 690

(footnote continued)

These cases cannot provide guidance in preemption analysis. There is no question that in usury cases courts must include as interest some fees and charges associated with loans. Otherwise, usury laws would be easily circumvented by creative lenders. However, even if some of these fees and charges must be computed-in for usury purposes, they are not interest in the

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(footnote continued)

F. 2d 781 (9th Cir. 1982), the primary issue was how much money had been loaned, not whether the charge was properly considered "interest" (which, the bank conceded, should be defined with reference to federal, not state, law) while in Panos v. Smith, 116 F.2d 445 (6th Cir. 1940) and Cronkleton v. Hall, 66 F.2d 384 (8th Cir. 1933), the Courts of Appeals made unremarkable rulings that illegal front-end charges for mortgage taxes and recording fees (Panos) and bonuses or commissions (Cronkleton) were simply interest in disguise. None of these cases directly addressed the issue of the scope of preemption under §85, much less §521.

ordinary meaning of the word as used in §521. Nor was the relationship between those fees and interest construed in a preemption context in which the presumptions against preemption would apply. In sum, the usury cases provide no guide whatsoever as to the scope of Congress's preemptive intent. Neither DIDA nor the National Bank Act preempt state regulation of late charges and other charges not included within the plain meaning of the term "interest."

III. AFTER FINDING THAT "DIDA'S TEXT AND LEGISLATIVE HISTORY ARE, AT BOTTOM, INCONCLUSIVE," THE FIRST CIRCUIT SHOULD NOT HAVE FOUND PREEMPTION.

Section 521 contains no broadening language such as that recently interpreted in Morales, supra, 112 S. Ct. 2031 (1992) (Congressional preemption of state regulation "relating to" airline rates, routes or services).

It expressly preempts only limitations on "interest." The First Circuit explicitly found the absence of clear intent to preempt late charge laws, stating that "DIDA's text and legislative history are, at bottom, inconclusive." App. A - 41. The court's ultimate finding of preemption is thus inconsistent with the Supreme Court's recent preemption cases.

The First Circuit ignored the principle that "the historic police powers of the States are not to be superseded by . . . [the] Federal Act unless that is the clear and manifest purpose of congress." Cipollone v. Ligget Group, Inc., 112 S. Ct. 2608, 2617 (1992) (quotation marks and citations omitted). No "clear and manifest purpose" was found. In fact, the court found the exact opposite --

inconclusiveness.

The First Circuit read Cipollone incorrectly and created a novel approach to express preemption analysis.

> [S]o long as Congress's intent to effect preemption remains clear and manifest, uncertainty which pertains only to the contours of the ensuing preemption does not necessitate an alteration of a reviewing court's basic analytic approach.

App. A. - 19. In the quoted sentence, and in the actual course of its analysis, the court adopted the approach that once Congress has expressed an intent to preempt, the courts are largely free to define the scope of the preemption. This position goes beyond even the "ordinary meaning" standard suggested in Justice Scalia's Cipollone dissent:

> The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions

> in general: Their language should be given its ordinary meaning.

112 S.Ct at 2634. When, as in this case, after considering the ordinary meaning of terms, a court explicitly finds that the statutory text and legislative history are "inconclusive" as to Congressional intent to preempt a given area, this Court's rulings do not allow the court to continue an extended guessing exercise based on marginally relevant authority. The policy requiring a "clear and manifest purpose" to preempt must, at some point, be given effect.

The First Circuit's derivation of a broad preemptive scope for Section 521 conflicts with the Second Circuit's more proper analytic approach in Cable Television Association v. Finneran, 954 F.2d 91 (2d Cir. 1992). Although Congress had expressly preempted state

regulation of "rates for the provision of cable services," the Second Circuit nonetheless found that regulation of charges for downgrading cable services could be regulated by the states. Even though downgrading services is far more plausibly within the scope of "provision" than late charges are within the scope of "interest," the Second Circuit applied the correct standard for preemption analysis, stating:

> Where there are <u>persuasive indicia</u> that Congress intended exclusive federal regulation of the sphere in question, then the state act cannot stand . . . [Citations Omitted] . . . Absent such an intent, the state rule will only fall if it actually conflicts with the federal law.

954 F.2d at 95 (emphasis added). After finding no evidence of a broad preemptive intent in the language or legislative history of the cable

statute, the Second Circuit stopped and found there was no preemption. By contrast, the First Circuit continued its analysis through a discussion of marginally relevant state and federal usury cases after finding the statute and legislative history "inconclusive." This Court should grant the Petition for Certiorari to prevent other courts from following the First Circuit's approach to preemption analysis.

IV. THE FIRST CIRCUIT'S HOLDING IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS AS TO THE PREEMPTIVE SCOPE OF THE NATIONAL BANK ACT.

The First Circuit's finding of preemption conflicts with the long line of cases upholding dual state and federal regulation of National Banks. The §85 preemption of state law as

applied to National Banks should, if different, be broader than the §521 preemption of state law applied to state banks, given that National Banks, but not state banks, are "national favorites." App. C- 59. The breadth of the First Circuit's preemptive holding, if applied to National Banks, would conflict with other Circuit's analyses. A fortiori, the direct holding with respect to state-chartered banks conflicts with other Circuits.

The First Circuit gave insufficient weight to the rule that National Banks are, absent a conflict, subject to state laws: "This court has often pointed out that National Banks are subject to state laws, unless those laws infringe the national bank laws or impose an undue burden on the performance of the bank's

functions." Anderson National Bank v. Luckett, 321 U.S. 233, 248 (1944) (upholding a state escheat statute applied to a national bank). See also, U.S. v. Philadelphia National Bank, 374 U.S. 321, 328 (1963); Franklin National Bank v. New York, 347 U.S. 373, 378, n.7 (1954); Daggs v. Phoenix National Bank, 177 U.S. 549 (1900). Having made no finding of any actual conflict with federal law, the court should have followed the general principle of coexistence with state law laid out in the long line of National Bank cases.

The court's decision conflicts with those of other circuits that have analyzed alleged preemption of state consumer protection statutes under the National Bank Act. See e.g., National State Bank v. Long, 630 F.2d 981 (3d

Cir. 1980) (state anti-redlining statute not preempted; enforcement responsibility assigned to Comptroller of Currency); State of North Dakota v Merchants National Bank and Trust Co., 634 F.2d 368 (8th Cir. 1980) (en banc) (very narrowly limiting preemption of state unfair competition law to the area where it directly conflicted with the authority of the O.C.C.).

The First Circuit stands in direct opposition to the Supreme Court of California which held that California's unconscionability law could restrict charges for bounced checks -- charges analogous to late fees, but in a deposit, rather than loan, context. The court found that the restrictions neither conflicted with nor frustrated the purpose of the National Bank Act or DIDA and were not preempted. Perdue v.

Crocker National Bank, 702 P.2d 503, 520-24 (Cal. 1985), appeal dismissed, 475 U.S. 1001 (1986).

The First Circuit does, in a limited way, follow the coexistence rule in looking to Delaware for the definition of "interest." Delaware explicitly allows late charges "as interest." However, turning to Delaware to determine the preemptive scope of §521 begs the question of whether Congress intended to preempt late charge regulation. Only if Congress meant to preempt late charge restrictions would a §521 analysis then turn to the late charge laws of the bank's home state. Certainly, Congress did not intend to give each bank's home state the ability to control Congress' preemptive intent by controlling the definition of interest.

In First National Bank v. Dickinson, 396 U.S. 122 (1969), this Court confronted the issue whether federal or state law defined the term "branch" in the National Bank Act. This Court recognized that to permit state law to define the federal term "branch" would "make them the sole judges of their own powers" and that Congress "did not intend such an improbable result." 396 U.S. at 133-34.

That Congress did not specifically define "interest" in §521 does not mean it delegated the definitional role to the states. Congress did not intend for one state, by a unique definition of the term "interest" that includes delinquency charges and attorneys' fees for collection efforts, to preempt the consumer protection laws of all other

states. In fact, such a broad delegation would be "improbable." As noted by the district court, "Delaware does not enact law on behalf of Congress." App. C- 59, 60.

Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), is not to the contrary -- Marquette simply construes the language of §85 which allows a National bank to choose the interest rate allowed by its home state. Marquette does not define the types of loan regulation within the preemptive scope of §85. Marquette preemption is limited factually to numerical interest rates, with no mention of the exportation of other credit card terms, such as late

charges.[20/] This petition should be granted to properly define the scope of this Court's holding in Marquette.

20/ The District Court noted that "Marquette's discussion of the National Bank Act does not teach a general dynamic of ever-expanding preemption or a Congressional strategy of uniform credit regulation which extends irresistibly to displace all state restrictions on state banks." App. C - 72. The deference that the First Circuit gave to unofficial informal opinion letters from the Office of the Comptroller of the Currency and the Federal Home Loan Bank Board (App. A - 52), that expand the preeemptive scope of Marquette, the National Bank Act, and DIDA, is not justified under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Deference is not warranted when, as here, the language of the statute is clear and there is no discernible Congressional intent to preempt. See, e.g., Demarest v. Manspeaker, 111 S.Ct. 599, 603 (1991). Perdue, supra, 707 P.2d at 519-520.

V. THE FIRST CIRCUIT'S CONSTRUCTION OF SECTION 521 OF DIDA, TO INCLUDE LATE CHARGES WITHIN THE TERM "INTEREST," CONFLICTS WITH THE TRUTH-IN-LENDING ACT AND OTHER RELEVANT AUTHORITY.

Even if the Court of Appeals' broad preemption logic were correct as applied to other incidental loan charges which might fairly be viewed as "interest," it would not be correct as applied to late charges. Late charges are not "interest" and regulation of them is not preempted by section 521. They are not "compensation for the use or forbearance of borrowed money", especially in credit card accounts. Greenwood continues to receive interest on its past due accounts, in addition to late charges. Late charges are contingent on lateness of payment, not on the making of the loan itself, and are therefore not to be included in evaluating the interest rate of the loan.

The federal Truth in Lending Act ("TILA"), 15 U.S.C. 1601 et seq., authoritatively defines consumer credit loan terms. Central to TILA is the "Finance Charge" which is a comprehensive economic measure of the borrower's costs of credit. The Finance Charge is defined as:

> . . . the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit . . . . Examples of charges which are included in the finance charge include...(1) Interest....

15 U.S.C.§ 1605(a) (emphasis added). "Finance charge" is a broader definition of the costs of credit than the traditional term "interest." Interest is only one component of the Finance Charge. Courts interpreting usury laws have often construed "interest" broadly to resemble Finance Charge. The First

Circuit mistakenly adopted such a broad construction to define the scope of §521 preemption.

Even a Finance Charge analysis would exclude late charges. Late charges, unlike interest, are not imposed "incident to the extension of credit"; rather they are imposed as a result of a late payment. The regulations implementing the Truth in Lending Act explicitly exclude late charges from the computation of "Finance Charge." 12 C.F.R. §226.4(c)(2). These regulations are completely consistent with the Congressional definition of "Finance Charge." Indeed, Congress was well aware of the recognized commercial distinction between finance charges incident to the extension of credit and delinquency charges. See Johnson v.

McCracken-Sturman Ford, Inc. 527 F.2d 257, 265-66 (3d Cir. 1975).

The Senate Report on DIDA specifically incorporated TILA terminology in its explication of §501, a sister provision to §521. S. Rep. No. 368, 96th Cong., 1st Sess. 19 (1979) ("We intend to exempt only those limitations that are included in the annual percentage rate") (emphasis added). In addition, Congress amended portions of TILA as part of the DIDA package. While TILA is not specifically cited in the legislative history of §521 per se, to read DIDA without reference to TILA "is to read it out of the context in which Congress enacted it." Cf. Allen v. Grand Central Aircraft Co., 347 U.S. 535, 541 (1954).

The common law points to the same conclusion that late charges are not interest. At common law, late fees typically were considered a form of contractual liquidated damages. The primary treatises, digests and case books on damages or on contracts have consistently treated liquidated damages, such as late fees, as a contract remedy distinct from "interest." See, e.g., Field, The Law of Damages Ch. 9 & §22 (1876); Williston, Contracts §§ 769-792 (1920) and § 781 (3d ed.); Corbin, Contracts § 1058; Sedgewick, Damages §§ 389-427 (9th ed. 1912); ALI, Restatement of Contracts § 339; U.C.C. § 2-718 (1983). The California Supreme Court succinctly described the differences in Garrett v. Coast and Southern Federal Savings and Loan Ass'n, 511 P.2d 1197 (Cal. 1973), where it noted:

> The fundamental difference between interest and penalty charges is that interest is a measure of compensation to which an obligee is entitled while a penalty is punitive in character. A penalty provision operates to compel performance of an act and usually becomes effective only in the event of default upon which a forfeiture is compelled without regard to the actual damages sustained by the party aggrieved by the breach.
>
> * * * * *
>
> We are compelled to conclude that a charge for the late payment of a loan installment which is measured against the unpaid balance of the loan must be deemed to be punitive in character. It is an attempt to coerce timely payment by a forfeiture which is not reasonably calculated to merely compensate the injured lender.

Id. at 1202-1203 (citations omitted).

See also Beasley v. Wells Fargo Bank, N.A., supra. Greenwood's late charges are not even measured against the unpaid balance -- they are a flat penalty charge.

Late charges are not "interest." Even under the First Circuit's erroneous approach to measuring the scope of §521 preemption, the court should not have preempted the Massachusetts prohibition of credit card late charges.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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92-794

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No. 92-

In the Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Opinion of the Court of Appeals for the First Circuit	Appendix A
Final Judgment under Fed. R. Civ. P. 54(b) of the United States District Court for the District of Massachusetts	Appendix B
Opinion of the United States District Court for the District of Massachusetts	Appendix C
Supplement to the Court's Memorandum and Order of October 22, 1991 of the United States District Court for the District of Massachusetts	Appendix D

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 91-2205
92-1065
92-1150

GREENWOOD TRUST COMPANY,
Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young,
U.S. District Judge]

Before

Selya, Circuit Judge,

Lay,* Senior Circuit Judge,

and Pieras,** District Judge.

Arthur R. Miller, with whom Andrew F. Lane, Gilbert R. Hoy, Jr., Warner & Stackpole, Burt M. Rublin, Wolf, Block, Schorr and Solis-Cohen, Alan R. Feldman, and Sullivan & Worcester were on brief, for appellant.

Ernest L. Sarason, Jr. and William T. Matlack, Assistant Attorneys General, with whom Scott Harshbarger, Attorney General, and Sarah Wald, Special Assistant Attorney General, were on brief, for appellees.

Frank Max Salinger and Robert E. McKew on brief for American Financial Services Association, amicus curiae.

Arnold M. Lerman, Christopher R. Lipsett, John B. Bellinger, III, Kenneth L. Chernof, and Wilmer, Cutler & Pickering on brief for Bank of America, et al., amici curiae.

John J. Gill, Michael F. Crotty, and Irving D. Warden on brief for American Bankers Association, amicus curiae.

Ralph J. Rohner, Marcia Z. Sullivan, and Steven I. Zeisel on brief for Consumer Bankers Association, amicus curiae.

L. Richard Fischer, Robert M. Kurucza, Steven S. Rosenthal, James A. Huizinga, and Morrison & Foerster on brief for Visa U.S.A., Inc. and Mastercard International Incorporated, amici curiae.

Alfred J.T. Byrne, General Counsel, Douglas H. Jones, Senior Deputy General Counsel, Thomas A. Schulz, Assistant General Counsel, Colleen B. Bombardier, Senior Counsel, and Lisa M. Miller, Counsel, on brief for Federal Deposit Insurance Corporation, amicus curiae.

Marsha Kramarck, Deputy Attorney General, on brief for Delaware State Bank Commissioner, amicus curiae.

Richard P. Eckman, Daniel I. Prywes, Joseph L. Lakshmanan, and Pepper, Hamilton & Scheetz on brief for Delaware Bankers Association, amicus curiae.

Lee Fisher, Attorney General (Ohio) and Kathleen McDonald O'Malley, Chief Counsel, Office of Attorney General, on brief for States of Ohio, Arizona, Illinois, Louisiana, Nevada, South Dakota and Utah, amici curiae.

Bonnie J. Campbell, Attorney General (Iowa), and Peter R. Kochenburger, Assistant Attorney General, on brief for States of Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Minnesota, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia and the District of Columbia, amici curiae.

Michael M. Malakoff, Ellen Doyle, Malakoff, Doyle & Finberg, Nicholas E. Chimicles, Michael D. Donovan, Robin Resnick and Greenfield & Chimicles on brief for Bankcard Holders of America, et al., amici curiae.

James C. Sturdevant, Kim E. Card, Sturdevant & Sturdevant, and Gail Hillebrand on brief for Consumer Action and Consumers Union, amici curiae.

Albert Endsley, Steven W. Hamm, and Philip S. Porter on brief for National Conference of Uniform Consumer Credit Code States and American Conference of Uniform Consumer Credit Code States, amici curiae.

August 6, 1992

*Of the Eighth Circuit, sitting by designation.
**Of the District of Puerto Rico, sitting by designation.

SELYA, Circuit Judge. This train wreck of a case arises out of a headlong collision between a state consumer-protection law and a federal banking law. It brings into sharp focus the tensions inherent in our federalist system while presenting a novel legal question: can a federally insured bank, chartered in Delaware, charge its Massachusetts credit-card customers a late fee on delinquent accounts, notwithstanding a Massachusetts statute explicitly prohibiting the practice? The district court answered this

question in the negative, enforcing the state statute and granting partial summary judgment in appellees' favor. Because we believe that the lower court was on the wrong track, we reverse. Federal law has the right of way in this area.

I.

Background

The pertinent facts are largely undisputed. Plaintiff-appellant Greenwood Trust Company (Greenwood) is a Delaware banking corporation. Its deposits are insured by the Federal Deposit Insurance Corporation. Through a wholly owned subsidiary, Greenwood offers an open end credit card - the Discover Card - to customers nationwide. More than one hundred thousand of its cardholders live in Massachusetts.

The terms and conditions applicable to use of the Discover Card are spelled out in a Cardmember Agreement. The Agreement stipulates, inter alia, that the holder must make a minimum monthly payment, calculated by reference to the credit-card balance outstanding from time to time, on or before a designated due date. Failure to make this payment in a timeous fashion constitutes a default. If the default is not cured within twenty days, a ten-dollar late charge is automatically assessed.

On October 27, 1989, the Commonwealth of Massachusetts advised Greenwood that its imposition of late charges under such circumstances contravened state law. The Commonwealth threatened to take legal action. Greenwood promptly launched a preemptive strike, filing a complaint for

declaratory and injunctive relief in the United States District Court for the District of Massachusetts.[1/] The Commonwealth denied that federal law preempted the Massachusetts statute. It also counterclaimed, seeking to bar Greenwood from assessing late charges and to collect restitutionary damages, together with civil penalties, referable to Greenwood's defiance of state law.

The district court adjudicated the parties' competing claims on cross-motions for summary judgment. Discerning no federal preemption, the court ruled that Massachusetts law applied. Since the court interpreted

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1/ Greenwood's suit invoked the Supremacy Clause of the federal Constitution. The Commonwealth and its Attorney General were named as defendants. For simplicity's sake we refer to both defendants as "the Commonwealth."

that law to forbid Greenwood's imposition of late charges upon cardholders who lived in Massachusetts, it denied Greenwood's motion and granted partial summary judgment in the Commonwealth's favor. Greenwood Trust Co. v. Massachusetts, 776 F. Supp. 21 (D. Mass. 1991). The district court certified its rulings for interlocutory appeal under 28 U.S.C. §1292(b) (1988). In light of the pivotal importance and broad commercial consequence of the questions presented, we accepted the certification. (As an aside, we remark that our belief as to the importance of the questions presented has been validated to some degree by the outpouring of amicus briefs, some favoring appellant's position and some opposing it.) These appeals

ensued.[2/]

II.

The Statutory Scheme

Two statutes lay at the heart of the dispute between these protagonists: the state law that prohibits the imposition of late fees by credit-card issuers, viz., Mass. Gen. L. ch. 140, §114B (1991) (Section 114B), and the federal law which arguably preempts the state statute, viz., Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified, as amended, in scattered sections of the U.S. Code). This case demands that we determine whether

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2/ Endeavoring to ensure that its flanks are fully protected, Greenwood has prosecuted three separate appeals, each with a different jurisdictional thrust. It is not necessary for us to distinguish among them.

section 114B's immovable prohibition survives section 521's irresistible preemptive sweep.

The Massachusetts statute is straightforward. It provides that: "No creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to . . . an open end credit plan." Mass. Gen. L. ch. 140, §114B.

On the other hand, section 521 is equally uncompromising:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, . . . with respect to interest rates, . . . such State bank[s] . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in

> effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. §1831(d)(a) (1988 & Supp. 1990).

III.

Discussion

A.

Preemption: General Principles

In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall declared that, under the rubric of the Supremacy Clause,[3/]

3/ The Supremacy Clause provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

state laws which "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," are preempted and, therefore, invalid. Id. at 211. This verity remains firmly embedded in our modern jurisprudence. See, e.g., Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991); Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707, 712 (1985); Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1117 (1st Cir. 1989), cert. denied, 495 U.S. 956 (1990).

In placing constitutional theory into practice, the Court has generally distinguished between express and implied preemption. Express preemption occurs "when Congress has 'unmistakably . . . ordained' that its enactments alone are to regulate a [subject, and] state laws regulating

that [subject] must fall." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)). In such instances, the only remaining question is whether a particular state statute intrudes into the federal pale. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988); Cable Television Ass'n v. Finneran, 954 F.2d 91, 98 (2d. Cir. 1992).

Implied preemption comes in a wide variety of sizes and shapes. Indeed, we have said that "[t]he concept . . . has a certain protean quality, which renders pigeonholing difficult." French v. Pan Am Express, Inc., 869 F.2d 1, 2 (1st Cir. 1989). Implied preemption can occur when Congress constructs a scheme of federal regulation "so pervasive as

to make reasonable the inference that Congress left no room for the States to supplement it"; or when an "Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"; or when the goals of, and obligations imposed by, the federal law make manifest a purpose to uproot state law. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); accord Mortier 111 S. Ct. at 2481-82; English v. General Elec. Co., 496 U.S. 72, 79 (1990). Implied preemption can also occur in situations involving actual conflicts, such as when compliance with both federal and state regulation is an impossibility, see, e.g., Florida Lime, 373 U.S. at 142-43, or when state law "stands as an obstacle

to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Certain common strands bind these diverse species of express and implied preemption together. Two such threads run through the fabric of the instant case. For one thing, in any preemption analysis, "the question of whether federal law preempts a state statute is one of congressional intent." French, 869 F.2d at 2; accord Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990); Securities Indus., 883 F.2d at 1117. For another thing, the different strains of preemption all operate on "the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose

of Congress." Rice, 331 U.S. at 230; see also, Mortier, 111 S. Ct. at 2482; California v. ARC America Corp., 490 U.S. 93, 101 (1989). Courts must tread cautiously in this arena because the authority to displace a sovereign state's law is "an extraordinary power . . . that we must assume Congress does not exercise lightly." Gregory v. Ashcroft, 111 S. Ct. 2395, 2400 (1991). Even federal statutes that contain express preemption clauses must be viewed through the prism of this assumption. See, Cipollone v. Ligget Group, Inc., 60 U.S.L.W. 4703, 4706-07 (U.S. June 24, 1992) (plurality opinion); id. at 4711 (Blackmun, J., concurring in part and dissenting in part).

B.

The Track We Must Travel

We move now from the general to the particular. Section 521 boasts an express preemption clause. In recent days, the High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption. See Cipollone, 60 U.S.L.W. at 4707 (plurality opinion); id. at 4711 (Blackmun, J., concurring in part and dissenting in part). Given the teachings of Cipollone and the plain language of section 521 ("notwithstanding any State constitution or statute which is hereby preempted for

the purposes of this section"), we reject the Commonwealth's contention that this is an implied preemption case.[4/]

Our conclusion that the proper analysis in this case reduces to an inquiry into express preemption is

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4/ The district court apparently accepted the Commonwealth's position and treated the case as one of implied preemption. See Greenwood Trust, 776 F. Supp. at 30. It is likely that this error derived from the miasma of doubt surrounding the applicability of section 521 in Massachusetts. The district court believed that the Commonwealth had exercised its right, under section 525 of DIDA, 12 U.S.C. §1730(g) note (since repealed by Title IV of FIRREA, Pub. L. No. 101-73, 103 Stat. 183, 363 (1989)), to opt out of section 521's preemptive grasp. See, e.g., Greenwood Trust, 776 F. Supp. at 24 n.6, 26, 30 & n.24, 35. The court overlooked, however, that although Massachusetts opted out in 1981, see 1981 Mass. Acts 231, it reversed direction and, in effect, opted back in well before this litigation began. See 1986 Mass. Acts 177 (repealing pertinent portions of 1981 Mass. Acts 231). Section 521 is, therefore, fully applicable to the instant case.

unaffected by the fact that the inquiry requires us to interpret the terms "interest" and "interest rates" as they are employed in section 521. While uncertainty about the meaning of interstitial terms in the text of a federal statute may affect the scope of express preemption, it does not bear directly on the character of Congress's preemptory intent. See Cipollone, 60 U.S.L.W. at 4707-10 (plurality opinion); id. at 4711-14 (Blackmun, J., concurring in part and dissenting in part); Cable Television, 954 F.2d at 98. In other words, so long as Congress's intent to effect preemption remains clear and manifest, uncertainty which pertains only to the contours of the ensuring preemption does not necessitate an alteration of a reviewing court's basic analytic approach.

C.

The Scope of Express Preemption Under Section 521

We must still resolve the crucial question of what state laws are preempted. Put specifically, is a state law banning the imposition of late charges a law regulating "interest" within the purview of section 521? If so, chapter 114B is preempted.

This inquiry necessarily reduces to ascertaining what Congress meant by the word "interest" in drafting section 521. In divining this legislative intent, it is incumbent upon us to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031-2036

(1992) (quoting FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990)). In the process, however, we should not wear blinders: if there is "good reason to believe" that Congress intended to deviate from the ordinary meaning of the language selected, then a reviewing court must follow the congressional lead. Cipollone, 60 U.S.L.W. at 4708 (plurality opinion) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)); see also American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

Should perlustration of a statute's text fail to disclose the scope of Congress's preemptory intent, we must then assess the statute's structure and purpose in order to probe Congress's wishes. Ingersoll-Rand, 111 S. Ct. at 482; FMC Corp., 111 S. Ct. at 407. Moreover, a court, faced with

the necessity of delineating a facially cryptic statute's preemptive scope, can repair to statutory history and legislative context in order to facilitate its inquiry into congressional purpose. See Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991); Blum v. Stevenson, 465 U.S. 886, 896 (1984).

1.

The Commonwealth urges, and the lower court determined, Greenwood Trust, 776 F. Supp. at 36-38, that section 521's language plainly limits its preemptory impact to state laws that govern numerical interest rates, thereby leaving state laws regulating flat fees unscathed - even when, as here, such fees arise out of the extension and maintenance of credit. We are not persuaded that the plain meaning of

"interest" and/or "interest rates" as used in section 521 requires so grudging an interpretation.

In the first place, we do not believe that the plain meaning of "interest" necessarily restricts the definition of the word to numerical percentage rates. Reference works typically define interest as "a charge for borrowed money[,] generally a percentage of the amount borrowed." Webster's Ninth New Collegiate Dictionary 630 (1989) (emphasis supplied); see also Black's Law Dictionary 812 (6th ed. 1990). Such definitions do not limit interest to numerical percentage rates, for they simply note that interest is often, but not always, expressed as a percentage. If the Commonwealth's circumscribed view of the word were accurate, there would

be no basis for suggesting that exceptions exist.

Judicial opinions also tend to shy away from limiting the word "interest" to numerical percentage rates. Specifically, federal case law has long suggested that, in ordinary usage, interest may encompass late fees and kindred charges.[5/] See e.g., Shoemaker v. United States, 147 U.S. 282, 321 (1893) ("Interest

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5/ Since we are interpreting the terms of a federal statute in a dispute between Massachusetts and a Delaware bank, we do not believe that definitions of interest emanating from courts in other states are relevant to our inquiry, except insofar as those cases purpose to interpret DIDA or its forebears. In any event, such state-law definitions go both ways. Compare, e.g., Perry v. Stewart Title Co., 756 F.2d 1197, 1207-08 (5th Cir. 1985) (under Texas law, late charges are not a component of interest) with, e.g., Swindell v. Federal Nat'l Mortgage Ass'n, 409 S.E.2d 892, 894-95 (N.C. 1991) (under North Carolina Law, late charges are a component of interest).

accrues either by agreement of the debtor to allow it for the use of money, or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due."); Brown v. Hiatts, 82 U.S. (15 Wall.) 177, 185 (1873) ("[i]nterest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention").

Thus, the door is open to appellant's interpretation of the term. Suggesting that an additional fee attached to a delinquent, defaulted account is related to the creditor's cost of lending that money does no violence to language, to precedent, or, indeed, to logic. Default necessarily increases the creditor's cost of processing a loan. Therefore, a late fee is sufficiently related to the "use

or forbearance of money, or . . . damages for its detention" that it can appropriately be classified as "interest."

In the second place, the use of words like "rate" in conjunction with the word "interest" does little to advance the Commonwealth's thesis. While there may exist support for the assertion that a flat fee is not included in the plain meaning of terms such as "rate" and "interest rates," section 521's preemptive reach cannot so easily be restricted to numerical percentage rates. Terms in an act whose meaning may appear plain outside the scheme of the statute can take on a different meaning when read in their proper context. See United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979); Train v. Colorado Pub. Interest

Research Group, Inc., 421 U.S. 1, 10 (1976). As Judge Learned Hand once wrote, words can be "chameleons, which reflect the color of their environment." Commissioner v. National Carbide Corp., 167 F.2d 304, 306 (2d. Cir. 1948), aff'd, 336 U.S. 422 (1949).

In short, the plain-meaning doctrine is not a pedagogical absolute. This rule of construction is more "an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence" in contradiction to supposedly plain meaning if such evidence exists. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.). Hence, a court must always hesitate to construe words in a statute according to their apparent meaning if to do so would defeat Congress's discovered intendment. See

Bob Jones Univ. v. United States, 461 U. S. 574, 586 (1983); Watt v. Alaska, 451 U. S. 259, 266 (1981); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). It follows that:

> deference to the plain meaning rule should not be unthinking or blind. We would go beyond the plain meaning of the statutory language when adherence to it would produce an absurd result or an unreasonable one plainly at variance with the policy of the legislation as a whole.

Massachusetts Fin. Servs., Inc. v. Securities Investor Protection Corp., 545 F.2d 754, 756 (1st Cir. 1976) (citations and internal quotation marks omitted), cert. denied, 431 U.S. 904 (1977); accord In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978).

Viewed as part of this mise-en-scene, the Commonwealth's plain-meaning argument cannot carry the

day. The argument gathers little steam because the use of the terms "interest" and "interest rates" in section 521 is an example of how phrases' meanings can take on different colorations when read in their legislative and historical context. Accordingly, we must move beyond the plain-meaning doctrine to determine the scope of express preemption under section 521.

2.

The preamble to section 521 states that the law was created "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks." To understand the reference, we examine the historical context.

As the 1970s wound down, the Nation was caught in the throes of a devastating credit crunch. Interest

rates soared. See, e.g., United States v. Ven-Fuel, Inc., 758 F.2d 741, 764 n.20 (1st Cir. 1985)(cataloguing fluctuations in the prime rate from 1975 to 1983). Nevertheless, state lending institutions were constrained in the interest they could charge by state usury laws which often made loans economically unfeasible from a lender's coign of vantage. See Gavey Properties/762 v. First Fin. Sav. & Loan, 845 F.2d 519, 521 (5th Cir. 1988); Bank of New York v. Hoyt, 617 F. Supp. 1304, 1309 (D.R.I. 1985). National banks did not share this inhibition because they could charge whatever interest rates were allowed under the National Bank Act of 1864, c. 106, 13 Stat. 99 (1864) (codified, as amended, in scattered sections of 12 U.S.C.) (the Bank Act), and specifically, those rates

which were permitted under Bank Act §85, 12 U.S.C. §85 (1988), quoted infra note 7. Since section 85 authorized national banks to use interest rates set by reference to federal discount rates, state institutions were at an almost insuperable competitive disadvantage.[6/]

Congress tried to level the playing field between federally chartered and state-chartered banks when it enacted DIDA. See 126 Cong. Rec. 6,907 (1980) (section 521 will "allow[] competitive equity among financial institutions, and

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6/ Section 85 was originally enacted to shield national banks from state laws that were discriminating against them. See Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 314-18 (1978); Cong. Globe, 38th Cong., 1st Sess. 2126 (1864) (statement of Sen. Sherman). More than a century later, this shield had become a sword wielded by national banks against state-chartered lenders. As we have written before, "irony is no stranger to the law." Amanullah v. Nelson, 811 F.2d 1, 18 (1st Cir. 1987).

reaffirm[] the principle that institutions offering similar products should be subject to similar rules") (statement of Sen. Bumpers); 126 Cong. Rec. 6,900 (1980) (section 521 should "provide[] parity, or competitive equality, between national banks and State[-]chartered depository institutions on lending limits") (statement of Sen. Proxmire). To achieve this objective, Congress engrafted onto DIDA's bare bones, at several points, language taken from the Bank Act. Section 521, modeled on section 85 of the Bank Act, was the site of one such transplantation.[7/]

7/ We consider the transplanted language to be the following:

> [A state-chartered, federally insured depository institution], with respect to interest rates,

(footnote continued)

(footnote continued)

> . . . may . . . take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. §1831(d)(a) (DIDA §521). The comparison between this language and the language of section 85 is striking. The latter provided in relevant part:

> [A national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . .

12 U.S.C. §85 (1988) (Bank Act §85). Although there are niggling variations,

(footnote continued)

The parallelism was not mere happenstance. To the exact contrary, Congress made a conscious choice to incorporate the Bank Act standard into DIDA. See, e.g., 126 Cong. Rec. 6,907 (1980) (statement of Sen. Bumpers); 125 Cong. Rec. 30,655 (1979) (statement of Sen. Pryor); see also Gavey, 845 F.2d at 521.

The historical record clearly requires a court to read the parallel provisions of DIDA and the Bank Act in pari materia. It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be

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(footnote continued)

the key phraseology is substantially identical. Accord Gavey, 845 F.2d at 521 (interpreting 12 U.S.C. §1730(g)(a), a section of DIDA containing language parallel to section 521).

interpreted the same way. See Morales, 112 S. Ct. at 2037; Ingersoll-Rand, 111 S. Ct. at 485-86; Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). So here. What is more, when borrowing of this sort occurs, the borrowed phrases do not shed their skins like so many reinvigorated reptiles. Rather, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947). Because we think it is perfectly plain that this portable soil includes prior judicial interpretations of the transplanted language, see Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1317-18 (1992); Pierce v. Underwood, 487 U.S. 552, 567 (1988); Lorillard v. Pons, 434 U.S. 575, 580-581

(1978), Bank Act precedents must inform our interpretation of words and phrases that were lifted from the Bank Act and inserted into DIDA's text.

While we believe that several principles inherent in section 85 were transfused into section 521, the critical item for present purposes is the principle of exportation. This principle, solidly embedded in the language and purpose of both acts, provides the mechanism whereby a bank may continue to use the favorable interest laws of its home state in certain transactions with out-of-state borrowers.[8/] See Marquette Nat'l Bank

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8/ The exportable rates are those available to the most favored lenders in the bank's state, not merely those available to lenders of a similar size, character, or function. See Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 411-13 (1874).

v. First of Omaha Serv. Corp., 439 U.S. 299, 313-19 (1978); Gavey, 845 F.2d at 521. To the extent that a law or regulation enacted in the borrower's home state purposes to inhibit the bank's choice of an interest term under section 521, DIDA expressly preempts the state law's operation.

Read in this way, the language borrowed from Bank Act §85 and incorporated into DIDA §521 achieves parity between national banks and their state-chartered counterparts by allowing lenders such as Greenwood to choose among three interest rate ceilings: (1) the highest rate lawfully permitted without reference to section 521; (2) a rate not more than one percent above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the federal reserve district where the

lender is located; or (3) the highest rate allowed by the laws of the state where the lender is located. Section 521's express preemption clause is designed to maintain this parity. Acting in combination with the principle of exportation, this clause necessarily derails any state-sponsored attempt to regulate the maximum interest chargeable by a federally insured bank chartered in another state. For our purposes, this means that any Massachusetts law applicable to Greenwood must yield to the preemptory force of section 521 insofar as the regulation of "interest" is concerned.

We reach this conclusion mindful of the fact that the state statute here at issue visits two areas which are squarely within the ambit of the states' historic powers - banking, see, e.g.,

Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve Sys., 472 U.S. 159, 177 (1985); Valley Bank v. Plus Sys. Inc., 914 F.2d 1186, 1195 (9th Cir. 1990), and consumer protection. See, e.g., ARC America, 490 U.S. at 101; General Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990). Although this circumstance means that any preemption provision must be construed cautiously and with due regard for state sovereignty, see Cipollone, 60 U.S.L.W. at 4706-07 (plurality opinion); id. at 4711 (Blackmun, J., concurring in part and dissenting in part), it does not serve as a buckler against the force of the Supremacy Clause. When Congress has acted within its authority and its intent to displace state law is clear - preconditions which obtain here - preemption is not foreclosed by the fact

that the federal statute intrudes into the range of subjects over which the states have traditionally exercised their police powers.[9/] See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982).

3.

To be sure, the impuissance of the Commonwealth's plain-meaning argument signifies only that the terms "interest" and "interest rates" as used in section 521 are susceptible to interpretation - not that the Commonwealth's interpretation of those terms is necessarily wrong or that the appellant's interpretation is

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9/ By the same token, the relative importance of a state law to a state sovereign is immaterial when that law is displaced by valid federal statute, for the Framers provided that the federal law must prevail. See Free v. Bland, 369 U.S. 663, 666 (1962).

necessarily correct. To like effect, our recognition of DIDA's ancestry, while illuminating, provides us with no definitive answer to the precise question at hand. Since DIDA's text and legislative history are, at bottom, inconclusive, we must look either to federal common law or to state law to give content to the terms in question.

In general, the words and phrases contained in a federal statute are defined by reference to federal law. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989); Jerome v. United States, 318 U.S. 101, 104 (1943). There are two compelling reasons for adhering to this praxis. First, application of state-law definitions may threaten the policies or interests which a federal statute is designed to serve. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728

(1979); Burks v. Lasker, 441 U.S. 471, 479 (1979). Second, application of state-law definitions may disrupt Congress's desire for nationwide uniformity under a federal statute. See Kamen v. Kemper Fin. Servs., Inc., 111 S.Ct. 1711, 1717 (1991); Mississippi Band, 490 U.S. at 43-44.

Resort to uniquely federal definitions is not, however, automatic. "Congress sometimes intends that a statutory term be given content by the application of state law." Mississippi Band, 490 U.S. at 43. In such instances, a federal court may properly use state law to fill the interstices within a federal legislative scheme. See, e.g., Kamen, 111 S. Ct. at 1722-23 (holding it proper to borrow a definition from state corporate law); Mississippi Band, 490 U.S. at 47-53

(allowing state-law definition of "domicile" to inform a federal definition); Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 204-05 (1982) (similar, in corporate-law context); De Sylva v. Ballentine, 351 U.S. 570, 580-81 (1956) (borrowing definition from state domestic relations law); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 208-10 (1946) (borrowing definition from state property law). This "does not mean that a State would be entitled to use [a statutory term] in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept [of that term] we [may] deem state law controlling." De Sylva, 351 U.S. at 581.

In this case, we need not decide

whether federal or state law is the appropriate point of reference. Since both sources produce the same result, it would be a mere matter of form - and idle - to choose between them. See Royal Business Group, Inc. v. Realist, inc., 933 F.2d 1056, 1064 (1st Cir. 1991) (eschewing choice of law where, whatever the choice, the result of the litigation would not be affected); Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076, 1092 (1st Cir. 1989) ("When a choice-of-law question has been reduced to the point where nothing turns on more precise refinement, that should be the end of the matter.") We illustrate briefly.

a.

Section 521 allows a state bank to charge interest "at the rate allowed by the laws of the State . . . where the

bank is located." We think this is a fairly clear indication that, if a state-law definition of interest is applicable, it must emanate from Delaware law. We so hold, much bolstered by the recognition that section 85 "adopts the entire case law of [a state bank's home] state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state." First Nat'l Bank v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975); accord Roper v. Consurve, Inc., 777 F. Supp. 508, 510-11 (S.D. Miss. 1990), aff'd, 932 F.2d 965 (5th Cir.) (table), cert. denied, 112 S. Ct. 181 (1991). Our conclusion is further fortified by the knowledge that several other federal tribunals, in addition to the Nowlin and Roper courts, have interpreted identical

language in section 85 of the Bank Act as adopting definitions drawn from the law of the state where the bank is located. See, e.g., Daggs v. Phoenix Nat'l Bank, 177 U.S. 549, 555 (1900); Union Nat'l Bank v. Louisville, N.A. & C. Ry., 163 U.S. 325, 331 (1896); NCNB Nat'l Bank v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds by Busby v. Crown Supply, Inc., 896 F.2d 833, 840-42 (4th Cir. 1990) (en banc); Bartholomew v. Northampton Nat'l Bank, 584 F.2d 1288, 1295 (3d Cir. 1978); McAdoo v. Union Nat'l Bank, 535 F.2d 1050, 1055-58 (8th Cir. 1976); NorthwayLanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855, 861-64 (6th Cir. 1972).

Delaware law explicitly incorporates late charges into the definition of

interest and allows lenders to assess such fees against credit-card customers. See Del. Code Ann. tit. 5, §950 (1985 and Supp. 1990). Thus, were we to look to Delaware law for help in fathoming the meaning of "interest" and "interest rates," late charges would be included. In that event, section 114B's prohibition on late fees would be nullified by section 521's express preemption of state laws limiting exported interest rates.

b.

Federal common law brings us to precisely the same result. Several courts, in analyzing the language of section 85 of the Bank Act, have had little trouble in construing the term "interest" to encompass a variety of lender-imposed fees and financial

requirements which are independent of a numerical percentage rate. See, e.g., American Timber & Trading Co. v. First Nat'l Bank, 690 F.2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); Fisher v. First Nat'l Bank, 548 F.2d 255, 258-61 (8th Cir. 1977) (fee for cash advance); Panos v. Smith, 116 F.2d 445, 446-47 (6th Cir. 1940) (taxes and recording fees); Cronkleton v. Hall, 66 F.2d 384, 387 (8th Cir.) (bonus or commission paid to lender), cert. denied, 290 U.S. 685 (1933); Nelson v. Citibank (South Dakota) N.A., ___ F. Supp. ___, ___ (D. Minn. 1992) [1992 W.L. 112166 at *6-*9] (late fees). Fairly read, these opinions expand the scope of section 85 preemption - and, by implication, the scope of section 521 preemption - well

beyond periodic percentage rates.[10/]

10/ The court below relied upon the legislative history of DIDA §501, 12 U.S.C. §1735f-7a, to support the proposition that late charges are not a component of interest under section 521. Greenwood Trust, 776 F. Supp. at 29-32. Congress enacted section 501 as an amendment to the National Housing Act, while section 521 altered the Federal Deposit Insurance Act. The mere fact that both of these sections fell under the broad umbrella of DIDA does not make them fair congeners. Since DIDA contains an amalgam of different provisions, the legislative history and purpose of one section of DIDA does not necessarily inform the interpretation of all other parts of that law. See Bank of New York, 617 F. Supp. at 1311-13. As we have stated, "it is not unusual for the same word to have differing connotations in the same act and surely no canon of statutory construction forecloses courts from attributing to the word the meaning which the legislature intended that it should have in each instance." Sherman v. Hamilton, 295 F.2d 516, 520 (1st Cir. 1961), cert. denied, 369 U.S. 820 (1962); see also Dewsnup v. Timm, 112 S. Ct. 773, 777-78 (1992). This sentiment seems especially apropos in view of the fact that section

(footnote continued)

While we are aware that many of these cases involve the intrastate extension of loans by national banks rather than the exportation of interest rates, the analogy is persuasive. Furthermore, some of them do involve exportation. For example, Fisher concerned a credit-card cash advance fee charged by a Nebraska bank to a customer residing in Iowa. The court suggested

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(footnote continued)

501 addresses different categories of lenders and loans and contains materially different preemption terms than does section 521.

In light of the irrefutable evidence that section 521 was conceived as an offspring of section 85 of the Bank Act, we believe that the district court's reliance upon a comparison between it and DIDA §501 was misplaced. The proper analogy in this case is to compare lineal descendants who share common language and purpose, not distant cousins who share little more than a name.

that this fee was a component of the "rate of interest", making no distinction between the meaning of "interest" in intrastate, as opposed to interstate, transactions. Fisher, 548 F.2d at 258-61. For our part, we can discern no principled basis for such a distinction.

4.

It is, moreover, obvious that construing the terms "interest" and "interest rates" to include late charges fits most comfortably with the rationale undergirding section 521. DIDA was enacted in order to strike a competitive balance between state and national lending institutions by giving them equal power in charging interest rates. Allowing state banks to charge the same or similar fees in connection with the extension and maintenance of credit as national banks are allowed to charge

ensures parity between the two types of institutions.

Such a construction also finds broad support in the rulings and informal opinion letters of the various agencies charged with interpretating the meaning of section 85 and section 521. See, e.g., 12 C.F.R. §7.7310(a) (1992) (ruling of the Comptroller of the Currency to the effect that all of a bank's home-state laws "material to the determination of the interest rate" are exportable); Letter by Robert B. Serino, Deputy Chief Counsel of the Office of the Comptroller of Currency, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85, 676 (Aug. 11, 1988) (concluding that, under Bank Act §85, state-law prohibition of late charges may be preempted); Letter by Harry W. Quillian, Acting General Counsel of the

Federal Home Loan Bank Board 3 (June 27, 1986) (similar, interpreting DIDA §522).[11/]

We need not grease the rails. Given our conclusion that DIDA §521 should be interpreted *in pari materia* with its direct lineal ancestor, section 85 of the Bank Act, and given, also, the litany of cases extending section 85 to a wide variety of fees and charges associated with the extension and maintenance of credit, we see no reason to define either the term "interest" or the term "interest rates," for purposes of section 521, in a manner that excludes late fees.

11/ We need not join the parties' heated debate over the level of deference these materials deserve, for we would reach the same result independent of any reliance on them.

IV.

Conclusion

When Congress furnishes clear and unequivocal evidence of its preemptory mindset in the text of a statute, the "task of discerning congressional intent is considerably simplified." Ingersoll-Rand, 111 S. Ct. at 482. Here, section 521 provides with undeniable clarity that usury laws in effect in the borrower's state may be preempted as applied to federally insured banks chartered in other states.

With respect to the specific scope of section 521's preemption, section 85 of the Bank Act long ago laid the track upon which the parties must now travel. Section 85's preemption acts as a cowcatcher by brushing aside states' attempts to regulate "interest rates" charged by national banks. Included

within those displaced state laws are regulations regarding flat fees analogous to late charges. In passing DIDA, Congress expressly placed section 521 on the same footing. Hence, "interest" in section 521 encompasses late fee charges to credit-card customers. Section 114B, which prohibits the assessment of late charges, thereby regulates the interest a bank may charge in a more restrictive manner than federal law permits.

We need go no further.[12/] For the reasons set forth above, it is patent that the state statute is on a collision course vis-a-vis section 521.

12/ Inasmuch as we conclude that section 114B is preempted, we need not confront various other issues addressed by the court below. See Greenwood Trust, 776 F. Supp. at 39-47. We take no view of any such issues.

Given the imperatives of the Supremacy Clause, the whistle sounds loud and clear. Section 114B must yield. It is preempted.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREENWOOD TRUST COMPANY, Plaintiff,	)	
v.	)	CIVIL ACTION No. 89-2583-Y
THE COMMONWEALTH OF MASSACHUSETTS, and JAMES M. SHANNON, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	

FINAL JUDGMENT
UNDER FED. R. CIV. P. 54(B)

This matter having come on for hearing with respect to Greenwood Trust Company's ("Greenwood") Motion for Summary Judgment and the Commonwealth of Massachusetts' ("the Commonwealth") Motion for Summary Judgment, and the cross-motions for summary judgment

having been fully briefed by the parties and oral argument having been held, pursuant to the Court's Memorandum and Order of October 22, 1991 and the Supplement to the Court's Memorandum and Order of October 22, 1991, and the Court finding that there is no just reason for delay, it is hereby ordered, adjudged, and decreed and the Court enters final judgment pursuant to Fed. R. Civ. P. 54(b) as follows:

1. Mass. Gen. L. c. 140, §114B is not preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-211, Stat. 132.

2. The issue of late charges between Greenwood and Discover Card cardmembers residing in Massachusetts is governed by Massachusetts law and not by Delaware law, notwithstanding a contrary

choice of law provision in Greenwood's Cardmember Agreement.

3. The prohibition on credit card late charges in Massachusetts General Laws c. 140, §114B applies to Greenwood, a Delaware bank.

4. Greenwood has imposed late charges on Discover Card cardmembers residing in Massachusetts in violation of Massachusetts General Laws c. 140, §114B.

5. The Commonwealth is granted final judgment in its favor on Greenwood's Complaint for Declaratory and Injunctive Relief.

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Dated:

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREENWOOD TRUST COMPANY, Plaintiff,	)	
v.	)	CIVIL ACTION No. 89-2583-Y
THE COMMONWEALTH OF MASSACHUSETTS, and JAMES M. SHANNON, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	

MEMORANDUM AND ORDER

YOUNG, D.J. October 22, 1991

I. INTRODUCTION

This case raises a variety of novel and complex issues involving the interstate extension of consumer credit via credit cards and the concomitant regulation of the issuers of such credit cards by the several states. As the

parties and the amici[1/] point out, this appears to be a case of genuine first impression, both in this Circuit and through-out the United States.[2/]

The parties and amici have

1/ Amicus curiae briefs in support of the Greenwood Trust Company have been filed by the Delaware State Bank Commissioner and Delaware Bankers Association, Consumer Bankers Association, American Financial Services Association, Mastercard International, Inc., and VISA USA, Inc.

The following have filed amicus curiae briefs in support of the Commonwealth of Massachusetts and its Attorney General: the states of Iowa, Maine, Minnesota, South Carolina, and Wisconsin ("the amici states"), the National Association of Consumer Credit Administrators and the American Conference of Uniform Consumer Credit Code States.

The Court expresses its appreciation to all the amici for their able briefs and most helpful assistance in addressing these important issues.

2/ The amici states in their brief call to the Court's attention several recent cases raising some similar issues

(footnote continued)

extensively and skillfully briefed the primary issue as they conceive it: May Greenwood Trust Company ("Greenwood"), a federally-insured, state-chartered bank located in Delaware, assess its "Discover" credit card holders located in Massachusetts a late charge on delinquent accounts, a charge permitted in Delaware but prohibited in Massachusetts?[3/]

(footnote continued)

brought in the Iowa State courts. (Amici States' Br. at 7 and n. 7, 9). These cases, all of which settled short of judicial resolution on the merits, involved Iowa's attempt to enforce against national banks located in Iowa certain policies with respect to cardholder agreement late charges, choice of law, and other provisions.

3/ More broadly stated, the issue is: may a bank located in a state with permissive consumer lending laws take advantage of those favorable non-interest rate provisions in its own state's laws and "export" them to or impose them upon residents of another state which maintains greater consumer protection for its residents when they borrow in that state?

Resolution of this important question necessarily requires the Court to address two subsidiary issues -- a major question of federal preemption that concerns both the parties and the amici, and a lesser but potentially pivotal question of statutory interpretation of Massachusetts banking legislation, a matter that concerns the parties alone. The major question requires the Court to determine whether Massachusetts banking law is preempted under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2., by section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, United States Pub. L. No. 96-221 §521, 94 Stat. 132 (1980) ("DIDA"). If so, the prohibition of the Massachusetts usury law against such late charges must yield. If not, it

would appear that Greenwood must prevail unless, of course, the Massachusetts usury law itself, Mass. Gen. L. ch. 140, §114B, does not contemplate regulation of out-of-state credit card issuers such as Greenwood. Greenwood makes this argument, and the Commonwealth and its Attorney General demur.

Where, then, ought analysis begin? If Massachusetts law does not reach out-of-state credit card issuers, then this Court need not address the thorny issue of federal preemption -- an issue of nationwide significance. Conversely, if federal law preempts state regulation, this federal court need not -- and should not -- undertake to analyze the legislative intent of the Massachusetts legislature. Here the Court ultimately concludes, first, that federal law does <u>not</u> preempt

Massachusetts from barring late charges in credit card agreements; and second, that Massachusetts may prohibit Greenwood from collecting the presently disputed late charges under credit card agreements with Massachusetts citizens. Accordingly, though the outcome thus turns ultimately upon state law, resolution of the federal preemption issue is likewise necessary to determine whether to engage in an analysis of the Massachusetts statute.[4/]

4/ Greenwood, in its complaint, alleged that Massachusetts' enforcement of its late charge prohibition would violate the Commerce clause of the United States Constitution. (Complaint, ¶¶1, 5, 22-25.) This claim was not, however, pressed beyond that initial mention and does not appear in any briefs or oral arguments submitted by Greenwood in connection with the present motion for summary judgment.

II. STATEMENT OF MATERIAL UNDISPUTED FACTS[5/]

The plaintiff Greenwood is a Delaware banking corporation insured by the Federal Deposit Insurance Corporation. Greenwood, through its wholly-owned subsidiary, Discover Card Services, Inc., located in Illinois, issues the "Discover" credit card to customers nationwide, including several hundred thousand residents of Massachusetts. Greenwood actively

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5/ The parties agreed to submit the liability issues to the Court for resolution on their cross-motions for summary judgment. As required by Local Rule 18, the Commonwealth submitted a Statement of Material Undisputed Facts ("Statement") with its motion. Greenwood submitted no Statement in support of its motion. Thus, consistent with Rule 18, the Court takes as admitted by Greenwood the material facts set forth in the Commonwealth's Statement. Unless otherwise noted, affidavits, depositions, and other documents referred to here are attached to that Statement.

solicits cardmember applications nationwide through direct mail, telemarketing, and "take one" applications; it also conducts multi-media advertising nationwide. (Plaintiff's Answer to Interrog., No. 4).

Though Greenwood does not directly employ personnel in Massachusetts to make loans, Discover Card Services maintains a Massachusetts office with approximately eight employees. (Plaintiff's Answer to Interrog. No. 13[c]). That office solicits merchants in Massachusetts to accept the Discover Card. Id.

Pursuant to its Cardmember Agreement, Greenwood charges a monthly periodic rate of 1.5 percent to accounts in all states which have opted out of DIDA and 1.65 percent to accounts in all

other states.[6/] Cardmember Agreement ("Agreement") ¶15.

Greenwood also imposes a $10.00 "late charge" if a required payment is not made within 20 days after the payment due date in any month. (Agreement ¶17). Failure to make at least the minimum payment due by the due date in any month puts the cardmember in default. (Agreement ¶¶11, 18). Greenwood does not include late charges in its computation or disclosure of the Annual Percentage Rate in either Cardmember Agreement or monthly billing statement. (Plaintiff's Answer to

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6/ Massachusetts is a state which in 1981 elected to override, or "opt-out" of DIDA pursuant to Section 525 of that Act. Mass. Stat. 1981 ch. 231. Fourteen other states and Puerto Rico have enacted similar legislation.

Interrog. No. 15). It does separately identify the late payment charge in the Cardmember Agreement, and separately identifies finance charges and late payment charges on the monthly billing statement as "Finance Charges" and "Late Charges." Id.; (Agreement ¶¶13, 17). A Discover Card finance charge is imposed on unpaid balances, which include unpaid late charges. (Dep. of Robert Stormoen at 86-88). Multiple late fees are assessed in successive billing cycles for continuing unpaid balances past the 20-day period. Id. at 88-90. A finance charge is then imposed on unpaid balances, including multiple late charges. Id. at 89-90.

The purposes of Greenwood's late charges are to deter default, compensate it for additional collection expenses, and provide it with a source of revenue

in addition to interest charges. (Plaintiff's Answer to Interrog. No. 5; Stormoen Dep. at 62-63). The payment of a late charge per se does not influence Greenwood's decision as to whether to extend further credit or suspend credit privileges.[7/] (Stormoen Dep. at 26).

Greenwood's late charges to Massachusetts residents involve a substantial sum of money, the amount of which the parties have agreed to keep confidential. (Statement ¶2). The Cardmember Agreement contains a choice of law provision specifying that the

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7/ Both Greenwood and amici Mastercard and Visa have argued that late charges are either components of finance charges or material to determination of the rate of interest. This Court rejects that argument as untenable on the undisputed material facts of record. See infra at 39-44.

Agreement "will be governed by the laws of the State of Delaware and applicable federal laws." (Agreement ¶25). Greenwood has never permitted a Massachusetts resident to enter into a Discover Cardmember Agreement on terms different from those on its printed form agreement, including the choice of law provision.

III. ANALYSIS

A. Preemption: The Federal DIDA Statute and State Usury Laws

1. Background of Federal and Massachusetts Legislation.

The present controversy between Greenwood and Massachusetts traces to the increasingly unsettled relations among banks, state regulators, and federal authorities over the last decade, since abrupt changes in Federal Reserve monetary policies and bank

deregulation have intensified interstate competition among financial institutions. The fast-growing credit card industry is a sphere of particular importance and interstate conflict as cards issued by 50,000 financial institutions and offices are now carried by over seventy million Americans, who used them in transactions amounting to well over $400,000,000,000 in 1989.[8/]

Since the early years of the Republic, the states have generally resisted the development of national banks and favored their own state chartered banks through regulatory

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8/ R. Burgess & M. Ciofli, Exportation or Exploitation? A States Regulator's View of Interstate Credit Card Transaction, 42 Bus. Law., 929 (1987); Mastercard International Inc. and VISA U.S.A., Inc. Br. 1-2.

legislation[9/] and the Supreme Court has, since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), generally limited federal statutory involvement by construing preemption narrowly and giving relatively free rein to state usury law regulations. See Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944); McClellan v. Chipman, 164 U.S. 347 (1896).

The National Bank Act of 1864, c. 106, 13 Stat. 99 (1864), favored the national banks and protected them from discriminatory state laws;[10/]

9/ O. Scroogs, A Century of Banking Progress 50-51 (1924), J. Knox, A History of Banking in the U.S. 12 (2d ed. 1969), as cited in the brief of the Consumer Bankers Association, 5-8.

10/ See Northway Lanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855, 861 (6th Cir. 1972); Consumer Bankers Association Br. 8-10.

and since 1933 they have been allowed to charge interest at one percent above the Federal Reserve discount rate or at the highest rate available to competing state banks under laws of the state named in their charter. Banking Act of 1933, ch. 89, §25, 48 Stat. 191.

The interest rates of state and national banks were comparable until 1979, when the Federal Reserve rate rose sharply, giving national banks a competitive advantage in states with lower usury law interest ceilings. The national banks' advantages were further enhanced through the Supreme Court's decision in Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978). The Marquette Court held that national banks were only required to comply with interest restrictions of

their charter state when doing business in that state; and that they could disregard other states' interest ceilings when doing business outside their home state.[11/]

The bleeding of capital from state banks to the national banks created a serious shortage of mortgage loan monies in many states by the late 1970s. The housing industry was especially affected by high interest rates and the dwindling of state bank mortgage capital.[12/]

Congress responded to the unprecedented crisis of simultaneous recession and inflation by enacting

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11/ See Burgess & Ciofli, supra note 8 at 935-36.

12/ Id. See William M. Burke & Alan S. Kaplinsky, Unraveling the New Federal Usury Law, 37 Bus. Law. 1079, 1096 (1982).

DIDA[13/] -- the Depository Institutions Deregulation and Monetary Control Act of 1980.[14/] Section 521 of DIDA allowed state banks, like the national banks, to charge interest at the federal rate and thereby preempted state usury laws. 12 U.S.C. §1831d. At the same time, Congress also recognized the continued importance of state consumer protection laws. Section 525 of DIDA gave states three years to enact legislation to

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13/ Usury Lending Limits: Hearings on S. 1988 Before the Senate Committee on Banking, Housing and Urban Affairs, 96th Cong., 1st Sess. (1979) ("Usury Lending Limits Hearings").

14/ DIDA was omnibus legislation that, in the respects relevant here, amended various statutes, including the Home Owners Loan Act (Section 501), the Federal Deposit Insurance Act (Section 521), the National Housing Act (Section 522), and the Federal Credit Union Act (Section 523). Each of these sections is amended by and subordinated to Title V of DIDA.

override the preemption provisions of the Federal Act. 12 U.S.C. §1730g note.

Spurred by the same financial crisis, Massachusetts in 1981 joined other states in amending its usury statute to raise the ceilings on interest rates for state-chartered financial institutions.[15/] The Commonwealth and 14 other states elected to opt out of DIDA preemption as allowed under section 525.[16/] Massachusetts raised its usury limit on open end credit card accounts to an across-the-board level of 18% and prohibited the levy of late charges on Massachusetts credit card

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15/ Mass. Gen. L. ch. 140, §114B, amended by Mass. Stat. 1981, ch. 384, §1.

16/ See 12 U.S.C. 1730g.

customers.[17/]

In contrast to the efforts of Massachusetts and states which sought to preserve usury laws through reform, a handful of states, most notably Delaware and South Dakota, responded to the credit crisis and the Marquette decision by passing laws which virtually eliminated interest rate and other usury restrictions.[18/] Delaware, in an effort to attract credit card issuers, completely deregulated its credit card issuers, encouraging banks such as

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17/ See note 15. In 1984, the 18% limit was modified slightly under circumstances not here relevant. Mass. Stat. 1984, ch. 489, §1.

18/ See Burgess & Ciolfi, supra at 935-36.

Greenwood to locate there.[19/] (Def's Mem. Supp. Summ. J. at 2-3; Amici States Br. at 6).

The controversy presently before this Court is most immediately concerned with the preemptive sweep of DIDA's section 521 and the reach of the Massachusetts usury law, Mass. Gen. L. ch. 140, §114B. But this case, in a larger sense, is part of the constant

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19/ Delaware's 1981 Financial Center Development Act "among other things . . . eliminated rate limitations on all classes of loans, liberalized Delaware's consumer lending law, and established a favorable tax structure for banks." Richard P. Eckman, The Delaware Consumer Credit Bank Act and "Exporting" Interest Under Section 521 of The Depository Institutions Deregulation and Monetary Control Act of 1980, 39 Bus. Law. 1264-65 (1984) (footnotes omitted) ("Eckman"). See generally Del. Code Ann. tit. 5, §§941-974. The Consumer Credit Bank Act of 1983 was designed to encourage small banking organizations to locate in Delaware to engage in interstate consumer lending.

challenge to strike the proper balance of federalism in a society of constantly evolving needs and aspirations.

2. Pathways to Preemption and Comparative Burdens.

Greenwood argues that the Commonwealth's enforcement of the late charge provisions of its consumer protection statute would conflict with the antidiscriminatory consumer lending provisions of Section 521 of DIDA, 12 U.S.C. §1831d ("Section 521"). That section allows state-chartered banks insured under the Federal Deposit Insurance Act, to charge interest at a federal rate and preempts conflicting state laws, as follows:

(a) Interest Rates

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks . . . with respect to interest rates, if the applicable rate prescribed in this

> subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section . . . charge on any loan or discount made . . . interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be greater. (emphasis added)

By these literal terms, preemption under section 521 is limited to state interest rates which conflict with the federal rate permitted by that provision. It was, as noted above, the unprecedented rise in the Federal Reserve discount rate in the late 1970's which gave rise to DIDA. The plain meaning of section 521 does not evince Congressional intent to preempt state

regulation as to other credit terms, apart from interest rates, such as the late charges challenged by Massachusetts.

Greenwood and its allied amici argue that section 521's stated purpose, ". . . to prevent discrimination against State-chartered insured depository institutions" translates into a "national policy of providing [federally] insured [state] banks competitive 'rate' parity with national banks." (Def's Mem. Opp'n. Summ. J. at 8). Such an ambitious policy, it is said, necessitates broad preemption of not only numerical interest rates, but all state restrictions on credit terms (including late charges) which affect the profits of lenders. Id. at 8-9.

This larger Congressional intent is said by Greenwood to be manifest in the legislative history of section 521 and

unmistakably implied by Congressional policy objectives advanced in other provisions of DIDA, from interpretive decisions of various administrative agencies, and from court decisions interpreting either the National Bank Act or the meaning of "rates" under that or other federal consumer protection statutes.

Massachusetts, countering, essentially relies upon the plain meaning of the "interest rate" language in section 521 and the history of Congressional deliberations prior to enacting DIDA. That evidence is said to demonstrate that Congressional concern was limited to discriminatory interest rates favoring national banks, and that preemption was intended to apply only to state interest rate ceilings. State

usury laws thus would remain vital and controlling over non-interest rate credit terms. The amici states also assert that consumer credit protection is a fundamental local interest, long recognized by Congress, and not displaced by the sweeping preemption urged by Greenwood.

This Court's assessment of preemption under section 521 is framed by two essential questions:

First, did Congress intend a limited or broad incursion upon state usury laws? Was the aim to cure interstate discrimination only in interest rate ceilings (based upon the literal language of section 521) or is it implicit that the larger Congressional aim was to establish a more uniform national credit card lending framework?

Second, did Congress impliedly intend by its use of the term "rates" in DIDA to preempt state law restrictions on all credit terms (including late charges) as well as state regulation of numerical interest rates standing alone?

The Court, in considering preemption claims, is cautioned by the longstanding presumption that "Congress did not intend to displace state law," Maryland v. Louisiana, 451 U.S. 725, 746 (1981), and that it should not unnecessarily disturb "the federal-state balance." United States v. Bass, 404 U.S. 336, 349 (1971). Indeed, greater restraint ought apply to preemption of spheres traditionally occupied by the states, as noted in the oft-cited language of Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947):

> Where . . . the field that Congress is said to have preempted has been traditionally occupied by the states . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless there was the clear and manifest purpose of Congress.

It is well settled that state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain "traditionally occupied" by the states.[20/] Accordingly, "[b]ecause consumer protection is a field traditionally regulated by the states, compelling

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20/ See Lewis v. BT Invest. Managers, Inc., 447 U.S. 27, 38 (1980) ("We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern"). See generally Barbara A. Curran, Legislative controls as a response to consumer-credit problems, 8 Boston College Industrial and Commercial Law Review, 409, 413-15, 418-20 (1967).

evidence of an intention to preempt is required in this area." General Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) (upholding New York's "Lemon Law" against a claim that a Federal Trade Commission consent decree preempted major elements of the local law).

Moreover, preemption analysis requires consideration of several distinct criteria. See Palmer v. Liggett Group, Inc., 825 F.2d 620, 624-25 (1st Cir. 1987). The crucial question underlying such an inquiry is always "whether Congress intended that federal regulation supercede state law." Id., quoting Louisiana Public Service Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 369 (1986). Of course, express statutory terms are the

surest indicator of preemptive intent. Where provisions are unclear or fail to address the preemption question, a cautious resort to legislative history is called for. American Tobacco v. Patterson, 456 U.S. 63, 75 (1982). Implied preemption is more difficult to establish; one must consider "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written [and] determine whether . . . . [they] are so inconsistent that the state law must give way . . . ." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977); see also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (pointing to the "physical impossibility" of simultaneous compliance with federal and state laws as a directive for preemption).

Further, preemption may be inferred from the overall scope of a statute if Congress has legislated so comprehensively as to occupy the entire field and leave no room for interstitial regulation by the states, Rice, 331 U.S. at 230.

Finally, a litigant not anchored to specific federal provisions may argue that preemption is implicit because "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" as generally discerned in a federal statute. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Greenwood embarks upon two routes to preemption. First, selected aspects of the legislative history of DIDA are singled out and highlighted as explicit

indications of Congress' broad preemptive intent. In the alternative, Greenwood and its amici banks seek to travel a more precarious route, attempting to imply preemption from the contradiction between the Massachusetts usury law against late charges and the accomplishment of what Greenwood calls a broad Congressional purpose to develop "competitive parity" between federal and state banks through a more uniform credit system. (Greenwood's Mem. Opp'n. Summ. J. at 8-9; Mastercard and VISA Br. at 3). Accomplishment of this larger Congressional purpose, according to Greenwood, requires that federal law preempt all state usury restrictions which "affect a lender's economic return." (Greenwood Br. at 13).

Greenwood's case for this overriding Congressional purpose depends

substantially upon an expansive reading of the "most favored lender" doctrine established by the National Bank Act of 1864 and elucidated in the landmark case of Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) which antedated the enactment of DIDA by two years.

The Commonwealth, defending its usury restrictions, argues that Congress intended, when enacting DIDA and section 521 in particular, to preempt state laws restricting only numerical interest rates and "not those laws concerning non-interest rate loan terms." (Commonwealth's Mem. Supp. Summ. J. at 9). Championing the vitality of state prohibitions against late charges, the Commonwealth and the amici states cite the express terms of section 521, the legislative history of section 501

of DIDA, additional federal consumer statutes, and two state supreme court decisions.

3. Legislative History of DIDA and its Section 521.

The record of Congressional debate and deliberation concerning the enactment of DIDA is generally supportive of the Commonwealth's argument that preemption of credit card regulation under DIDA is confined to numerical interest rates. The central unifying purpose of DIDA was to provide for increased access to home mortgage loans. Section 501 of DIDA provided for preemption of state usury limits on mortgage loans in a manner virtually identical to the treatment of other loans (including credit card agreements) in Title V, which contains the disputed section 521.

Massachusetts cites the Senate Report of deliberations over section 501 of DIDA which limits preemption and expressly exempts "late charges." Senate Report N. 96-368, 96th Cong., 2d sess. 19 (reprinted in 1980 US Code Cong. and Ad. News, Vol. 2, 236, 255):

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.

Greenwood dismisses this Senate Report as irrelevant because it was prepared prior to consideration of section 521. Greenwood's view, however, disregards the subsequent legislative history which links preemption concerns in section 501 both to the consideration of section 521, and to DIDA in its

entirety as passed on March 27-28, 1980. Massachusetts points out that Congress passed section 501 at the same time, and in the same title (Title V) of the same act, as section 521. (Commonwealth Reply at 2.)

During discussion on the Senate floor of the various bills which figured in the development of DIDA, Senators Pryor and Bumpers proposed an amendment to give state-chartered institutions "competitive equality" with national banks by allowing them to charge interest at one percent above the federal discount rate. S. 1988, 125 Cong. Rec. 30655 (November 1, 1979). Senator Proxmire, floor manager of the Senate bills under discussion, and chairman of the Senate Banking Committee, understood the proposed

amendment to override state usury laws and emphasized that there was "a sharp division and difference of opinion in the Senate." Id.

Separate hearings on the Pryor-Bumpers initiative, S. 1988, 96th Cong. 1st Sess. (1979) were held on December 17, 1979, and, though it was not reported out of committee, the bill's language was substantially incorporated into House Bill 4986, H.R. 4986, 96th Cong., 1st sess. (1979), which was, in turn, enacted as DIDA. Burke & Kaplinsky, supra, at 1096-97 and n.102; Usury Lending Limits Hearings.

Greenwood and its amici assert that Congressional commitment to a "national policy" of "competitive rate parity" through uniform national credit terms is manifest in the Senate consideration of

the Pryor-Bumpers bill, S. 1988. They have emphasized certain testimony at the Usury Lending Limits Hearings from various agency administrators and financial industry officials as evidence of a sweeping intent to eliminate all discrimination in credit terms between state banks and national banks. (Consumer Bankers Association's Br. at 13 [citing Usury Lending Limits Hearings at 2, 19, 20-21, 32, 36, 37, and 153-54]; American Financial Services Association's Br. at 8-11).

A fair reading of the legislative history, however, indicates that Congressional concern was focused with particularity on numerical interest rates. In introducing S. 1988, Senator Pryor noted, "A national bank may charge one percent above the Federal discount

rate, notwithstanding any State laws setting an interest-rate ceiling . . . [which] obviously discriminates in the strongest possible way against State banks." 125 Cong. Rec. 30655 (November 1, 1979). The great bulk of the subsequent committee testimony and discussion indicates that the proposed preemption amendment was limited since, in Senator Pryor's words, it "would merely allow State chartered, federally insured banks . . . to charge the same interest rate as national banks." Id. In fact, there were only two references to wider displacement of state law through expansion of the "most favored lender doctrine;" and these are the references upon which Greenwood relies so heavily in inferring a broader

Congressional purpose.[21/] Senator Bumpers, co-sponsor of the preemption amendment, confined his remarks to numerical interest rate disparities and remarked pointedly, "I do not think it is particularly healthy to be overriding state law." Id.

Even if the sponsors and supporters of DIDA preemption provisions were shown to be committed to achieving total competitive equality of all lending terms offered by state banks and national banks, Greenwood fails to come to terms with the simultaneous and persistent concerns of the bill's sponsors to preserve state consumer protection. During Senate consideration of the conference report on March 27,

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21/ See Usury Lending Limits Hearings, supra, at 32, 36, 37, 64-65, 151, 153-54; see also Burke & Kaplinsky, supra, at 1096-97 and n.105.

1980, Senator Proxmire emphasized the limited preemptive scope of Title V.[22/] This limitation in DIDA's Title V is clear from the Senate floor

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22/ 126 Cong. Rec. S. 6900 (March 27, 1980).

> [T]he Government must seek ways to remove competitive restrictions . . . .
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> Title V does this by preempting various usury laws while giving each State the opportunity to re-establish its usury limitations if it desires to do so. . . .
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> . . .
>
> I wish to reemphasize the point made initially in the Senate Banking Committee report that in exempting mortgage loans from State usury limitations, we intend to exempt only those limitations that are included in the annual percentage rate. We do not intend to exempt limitations on prepayment charges, attorneys' fees, late charges or similar limitations designed to protect borrowers.
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> . . .

(footnote continued)

discussions of mortgage loans, from the Senate Banking Committee Report, and from the hearings on DIDA in the House of Representatives.[23/]

(footnote continued)

> Title V also contains a provision which provides parity, or competitive equality, between national banks and State chartered depository institutions on lending limits.

23/ An official of the Federal National Mortgage Association, in response to an inquiry by Rep. St. Germain, Chair of a House subcommittee considering DIDA, referred to the Senate Banking Committee Report cited above and stated:

> This expression of legislative intent not to displace state laws designed for consumer protection with regard to charges other than charges treated as interest would leave in place those protective enactments in the various states that relate to prepayment penalties, late charges, regulations on disclosure of interest charges and restrictions on other costs in connection with loan transactions other than interest.

(footnote continued)

Greenwood's arguments for implied preemption as necessary to implement a clear Congressional goal can hardly stand if Congress actually sought to accommodate state usury restrictions in section 521. It is not surprising, therefore, that Greenwood and its amici ignore entirely the significance of the override provision of section 521, codified at 12 U.S.C. §1735f-7 Note, which is also common to section 501 and other sections of the statute. Those provisions expressly provided that states could, within three years of April 1, 1980, declare that they wished not to be bound by the Act's limited preemption of their states' laws.

(footnote continued)

Regulation Q. and Related Measures: Hearings Before the Subcommittee on Financial Institutions of the Committee on Banking, Finance and Urban Affairs, 96th Cong., 2d Sess. 125-26 (1980). (emphasis added)

Massachusetts so declared on June 4, 1981.[24/]

24/ Mass. Stat., 1981, ch. 231, "An Act Exempting the Commonwealth From the Usury Preemption Provisions of the 1980 Deregulation and Monetary Control Act," approved June 4, 1981 and effective by operation of law September 4, 1981. The opt-out provision refers to "loans, mortgages, credit sales and advances made in this commonwealth," (emphasis added), and it expressly refers to section 521 of DIDA. A 1986 amendment expressly applied to out-of-state loans by Massachusetts banks. Mass. Stat., 1986, ch. 177. Though it refers to "loans, mortgages, credit sales and advances," it does not refer to section 521 of DIDA.

The prohibition of late charges in open-end credit accounts, contained in Mass. Gen. L. ch. 140, §114B, was enacted on August 6, 1981, and became effective by emergency declaration of the Governor filed August 19, 1981. Mass. Stat., 1981, ch. 384, §1. Thus, the late charge prohibition was law when the Commonwealth's preemption opt-out became effective on September 1, 1981. By implication, then, Massachusetts intended that DIDA not preempt its legislative decision to prohibit late charges on open-end credit accounts. A question left open is whether the Massachusetts legislature thought its provision applied to late charges on loans originating in another state, such as Delaware. See infra at 57-62.

By April 1, 1983, 14 other states and Puerto Rico had similarly chosen not to be bound by DIDA preemption.[25/]

The Commonwealth, relying on this history, argues that in the face of Congressional silence as to the specific preemptive intent of section 521, the Court may reasonably infer that Congress intended to give the same limited meaning to preemption provisions throughout Title V of DIDA. See

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25/ The other 15 opt-outs include: Alaska, Colorado, Georgia, Idaho, Iowa, Kansas, Maine, Minnesota, Nebraska, Nevada, North Carolina, Puerto Rico, South Carolina, South Dakota, and Wisconsin. See One Hundred Years of Ineptitude, 70 Va. L. Rev. 1101, 1109 n.92 (1984). The Court notes that five of these states have joined as amici in support of the Commonwealth. It also notes that the second amicus in support of the Commonwealth, the American Conference of Uniform Consumer Credit Code States, is filed on behalf of six of the above states, plus Wyoming, Indiana, and Oklahoma.

Firestone v. Howerton, 671 F.2d 317, 320 n.6 (9th Cir. 1982) ("We follow the well-known maxim of statutory construction that, when the same terms are used in different sections of a statute, they receive the same meaning"); accord, Little People's School, Inc. v. United States, 842 F.2d 570, 573 (1st Cir. 1988).

Post-DIDA legislative history tends to confirm the conclusion that Congress in 1980 did not intend to bar states from prohibiting late fees by credit card issuers. In 1981 and in 1983-84 the Senate (but not the House) passed amendments to DIDA which would have expanded preemption of state usury laws, but would have expressly exempted late charges from preemption. Hearings on S. 730 Before the Senate Committee on Banking, Housing and Urban Affairs,

April 12, 1983; Hearings on S. 1720, 1981.[26/]

26/ S. 730, the "Credit Deregulation and Availability Act of 1983," would have amended Title V of DIDA to provide, in relevant part, as follows:

> Sec. 531. The provisions of the constitution or laws of any State prohibiting, restricting, or in any way limiting the rate, nature, type, amount of, or the manner of calculating or providing or contracting for covered charges that may be charged, taken, received or reserved shall not apply to an extension of consumer credit made by a creditor.
>
> Sec. 532.(a) As used in this part--
>
> (1) The term 'covered charges' means--
>
> (A) interest, discount, points, a time price differential, or any similar fees, charges, or other compensation paid to the creditor and arising out of the credit agreement or transaction for the use of credit or credit services. The term shall not include, however, fees, charges, or other amounts paid to the creditor or arising out of the credit agreement or transaction that are paid or arise solely as the result of

(footnote continued)

The failed S. 730 bill also expressly granted states the right to override preemption.[27/] The consistent and express limitations of these later bills certainly comport with Massachusetts' reading of the predecessor section 521 as confined to preemption of interest

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(footnote continued)

the failure or refusal of the debtor to comply with the terms and conditions of the debtor's agreement with the creditor, including without limitation the fact that the obligation is not repaid in accordance with the payment schedule. . . .

129 Cong. Rec. S. 17045-17046 (November 18, 1983) (emphasis added).

27/ It would also have given continuing effect to Massachusetts' 1981 override of the DIDA preemption provisions: "In addition, the bill preserves the actions of those States which have already rejected the Federal preemption of business and agricultural interest rate ceilings contained in the 1980 Act." 129 Cong. Rec. S. 2332 (March 8, 1983) (Statement of Senator Garn).

rates only.[28/]

Both the California and Texas Supreme Courts, after reviewing the legislative history of DIDA, afforded Title V only a narrowly construed

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28/ At lease one commentator who has advocated the position taken by Greenwood here does not understand Congress to have permitted preemption of non-rate charges by enacting DIDA:

> Whether Marquette presages a far-reaching federal choice-of-law principle or one that only applies to interest rates in another issue for future resolution. . . . Case-by-case resolution of the issues discussed here is an unattractive prospect. Consequently, Congress and the appropriate regulatory agencies should be strongly encouraged to adopt new legislation or regulations that will clearly authorize national banks and other federally insured depository institutions to export annual fees and other non rate charges.

Jeremy Rosenblum, Exporting Annual Fees, 41 Bus. Law. 1039, 1046-47 (1986).

preemption of their states' usury laws. In Seiter v. Veytia, 756 S.W.2d 303, 304-05 (Tex. 1988), the court held that section 501 did not preempt Texas law relating to usurious late charges. There, a seller of residential property, while conceding that DIDA was not intended to cover late charges on mortgage loans, argued that state law was nonetheless preempted since under Texas law late charges are considered interest and thus a part of the annual percentage rate. The court rejected the contention that state law could be used to define interest more broadly than Congress had intended. Id. at 305.[29/]

In Perdue v. Crocker Nat'l Bank, 702

29/ Seiter reached this result even though Texas had not chosen to exercise its right to opt-out of DIDA preemption under section 501(a)(2)(B). Id. at 304.

P.2d 503 (Cal. 1985), appeal dismissed, 475 U.S. 1001 (1986), the California Supreme Court considered another section of DIDA which provided for gradual removal of federal regulations limiting interest paid to depositors. The court held that neither DIDA nor the National Bank Act preempted state regulation of bank service charges for overdrafts, relying on the language of the Senate Report regarding "late charges or similar limitations designed to protect borrowers." Id. at 522-23 and n.37 (quoting Sen. Rep. No. 96-368, 1st Sess., P. 19 [1979]). Though not squarely on point here, Perdue does reinforce skepticism that in enacting DIDA Congress intended more than a limited intrusion into state substantive regulation of consumer transactions.

4. An Evolving Preemptive Purpose? The "most favored lender" doctrine under the National Bank Act, Marquette, and administrative decisions.

Greenwood and its amici argue that the statutes, administrative and court decisions which preceded DIDA point to a Congressional commitment to the equalization of credit terms in interstate banking and a legacy of widening preemption. Congress' purported intent to encourage uniform lending practices through section 521 is said to be a logical consequence of the "most favored lender" doctrine created in the National Bank Act of 1864 and developed in jurisprudence capped by the Marquette decision of 1978. Greenwood's Reply at 2; Greenwood's Mem. Opp'n. Summ. J. at 13-14. Greenwood would have this Court apply the familiar rule that "Congress is presumed to be aware of an

administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982) (citations omitted) (quoting Lorillard v. Pons, 434 U.S. 575, 580-81 [1978]).30/

The available legislative history, discussed above, affords little support for Greenwood's argument that Congress, in enacting section 521, sought to develop fully the most favored lender doctrine and thereby eliminate all differences in national and state

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30/ See Carolene Products Co. v. United States, 323 U.S. 18, 26 (1944) ("When words employed in a new statute had, at the time, a well known meaning in the law, the words are deemed to have been used in the sense of such meaning unless the context requires a different interpretation").

restrictions on credit card lending terms.[31/] However, some friendly authority is found in administrative decisions which deem the most favored lender doctrine from section 85 of the National Bank Act to have been incorporated in section 521 of DIDA. Greenwood notes that the language of section 30 of the National Bank Act which, as amended, is today 12 U.S.C. 85, closely parallels that of DIDA section 521, authorizing state-chartered banks to charge interest "at the rate allowed by the laws of the State . . . where the bank is located." Since 1936, the Comptroller of the Currency, the agency charged with enforcement of the National Bank Act, has interpreted section 85 as allowing a

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31/ See Burke & Kaplinsky, supra, at 1094-99.

national bank to "export" to its operations in other states any interest rate permitted to competing lenders by the state law of the state in which the national bank is chartered. See 12 C.F.R. §7.7310(a) (1978). This is the "most favored lender doctrine" as originally enunciated in Tiffany v. National Bank of Missouri, 85 U.S. [18 Wall] 409 (1874).[32/]

32/ Actually, Tiffany held only that section 85 permitted a national bank to charge the interest rate allowed to natural persons by the state where the national bank is located, even if that rate exceeds the rate allowed to state-chartered banks. The case "left unanswered the question of whether 'the rate allowed by the laws of the State . . . where the bank is located' includes the special state interest rate statutes applicable to regulated lenders which typically constitute exceptions to a state's general usury law. The same question remains unanswered under sections 521 through 523 of [DIDA]." Burke & Kaplinsky, supra, at 1096.

The Supreme Court, in Marquette, 439 U.S. at 314 n.26 (noting, with apparent approval, the Comptroller's interpretation) relied on the National Bank Act and its most favored lender doctrine, to allow a national bank chartered in Nebraska to charge its credit card customers in Minnesota a rate of interest authorized in Nebraska, but prohibited by usury law restrictions in Minnesota. 439 U.S. at 313-15. The Marquette court recognized that the "exportation" of interest rates from a national bank's "home State" (where chartered) into a foreign state would "significantly impair the ability of States to enact effective usury laws," but it found that such impairment "has always been implicit in the structure of the National Bank Act since citizens of

one State were free to visit a neighboring State to receive credit at foreign interest rates." Marquette, 439 U.S. at 318 (citation omitted) (footnote omitted).

The Court suggested Congressional action would be necessary to check the preemptive effect of the National Bank Act in a time of national bank deregulation, tightened credit availability, and an increasingly nationalized credit card lending system:

> This impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards. But the protection of state usury laws is an issue of legislative policy, and any plea to alter §85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19.

The decision in Marquette has been taken by lenders and issuers of credit cards to establish a de facto national interest rate, with exportation of the most profitable credit terms allowed under laws of lender-friendly states such as Delaware.[33/] It is notable that section 521, in seeming response to Marquette, contains express preemption language ("notwithstanding any State . . . statute which is hereby preempted for the purposes of this Section") which reaches beyond the preemptive scope of section 85 of the National Bank Act.

Greenwood's projections of sweeping Congressional purpose implying wholesale preemption are undone, however, by a closer reading of the reasoning in

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33/ See Burgess & Ciolfi, supra, at 935-36.

Marquette. The driving concern there was protection of the system of national banks established by the National Bank Act -- banks which have long been "National favorites" of Congress. Id. at 313-14. Congress assumed that each national bank was "located" in the state named in its organization certificate, with lending terms governed by the laws of that "home state." Id. at 310. If the Nebraska-based national bank was obliged to conduct its business in Minnesota under the latter's laws, its "location . . . [would] depend on the whereabouts of each credit card transaction," id. at 312, and such a result would "throw into confusion the complex system of modern interstate banking." Id.

The factual underpinning of Marquette cannot be ignored in the rush

of lenders to embrace the Supreme Court's general recognition of "the interstate nature of American banking" and the displacement of some state laws governing 'interstate loans' by the National Bank Act. Id. at 315, 318. Marquette preemption is limited factually to numerical interest rates, with no mention of the exportation of other credit card terms, such as late charges. Greenwood, as a Delaware-chartered state bank, is no "National favorite" as was the Nebraska bank, nor can Massachusetts' defense of its usury laws be equated with the position taken by Minnesota with respect to the Marquette bank, a position which the Supreme Court held so directly threatened the structure of the national bank system established under the National Bank Act. Delaware does not

enact law on behalf of Congress. The export of Delaware law to control the credit transactions of its banks in other states is not essential to preserve the legal identity of Delaware banks or the state banking system.

Even if it is accepted that section 521 is an outgrowth of Marquette, it does not follow that the particular Congressional purpose and preemptive sweep of the National Bank Act extend through Marquette to section 521 of DIDA. The Civil War Congress that enacted the original National Bank Act in 1863 expressly intended to create a national banking system,[34/]

34/ The nationalist nature of this legislation can hardly be overemphasized. As originally enacted in 1863 and amended in 1864, the National Bank Act was a significant war

(footnote continued)

(footnote continued)

measure designed to strengthen the central government and enable it to finance its widespread combat operations. After all, this is the same session of Congress that enacted the first draft law in our national history. "'The policy of this country,' [said] Senate Finance Committee chairman John Sherman, 'ought be to make everything national as far as possible; to nationalize our country so that we shall love our country.'" J. McPherson, Battle Cry of Freedom, 594 quoting Sherman's remarks as found in B. Hammond, Sovereignty and an Empty Purse: Banks and Politics in the Civil War, 326-27. Salmon P. Chase, Secretary of the Treasury, pressed for enactment of the National Bank Act "to augment the market for war bonds." J. McPherson, Battle Cry of Freedom, 593-94.

As Senator Robert C. Byrd remarks in his work, The Senate 1789-1989 at 258:

> Designed to replace the corrupt, decentralized, and inefficient system of state banks and bank notes, the National Banking Act was largely the work of Secretary [of the Treasury] Chase and Senate Finance Committee member John Sherman. It has three objectives. They include creation of a market for war bonds, reestablishment of the central banking system destroyed during the Jackson administration,

(footnote continued)

and exportation of rates by national banks was essential to prevent the discriminatory effects of state usury laws which traditionally favored state-chartered banks. 439 U.S. at 314-17. In contrast, the legislative history of DIDA, as already noted above, is extremely deferential to the state-federal balance, and the exportation of credit terms by state banks was apparently intended to prevent

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(footnote continued)

> and development of a stable bank-note currency. As amended in 1864, the Banking Act permitted banks to obtain federal charters and issue national bank notes up to 90 percent of their holdings of United States bonds. With modifications, this system remained the backbone of the nation's monetary structure until creation of the Federal Reserve System in 1913.

See Congressional Globe, 37th Cong., 3d sess., pp. 840-52, 896-97; L. Curry, Blueprint for Modern America: Non-Military Legislation of the First Civil War Congress (1968) 197-206.

intrastate discrimination by state laws favoring local banks against foreign state banks doing interstate business.[35/]

The most notable divergence between the National Bank Act and DIDA, of course, is that states were given no escape from National Bank Act supremacy, while section 525 of DIDA allows states to override the preemptive effect of DIDA by reasserting state usury ceilings otherwise preempted. 12 U.S.C. §1730g

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35/ "To the extent that national banks and federally insured institutions are not borrowing rates, they are not operating pursuant to authority conferred by the most favored lender doctrine. . . .

Institutions that export rates and terms from states such as Delaware with general credit laws [i.e., laws that do not discriminate against banks chartered in their states] are not borrowing the state law under which those terms are authorized. Only competitors' rates may be borrowed." Burgess & Ciolfi, supra, at 938.

note. (See Commonwealth's Mem. Supp. Summ. J. at 8 n.11.) Indeed, it is not at all clear that section 521 allows state banks to export even numerical interest rates to a state which, like Massachusetts, has opted out of DIDA preemption under section 525. The transubstantiation of the sweep of preemption under the National Bank Act via the blessing of Marquette into a like preemption under DIDA falters on this point. It is hard to square Greenwood's view that Marquette inspired section 521 with the fact that, "[t]here is only one reference to Marquette in the legislative history of sections 521 through 523 of the Act."[36/]

36/ Burke & Kaplinsky, supra, at 1104 and n.139 (citing statement of Georgia Commissioner of Banking).

Greenwood's portrayal of Marquette as the preemptive bridge over state usury laws which spans the distance from the National Bank Act to DIDA, does draw some support from one federal court and several agency informal interpretive rulings. In Gavey Properties/762 v. First Financial Sav. & Loan Asso., 845 F.2d 519 (5th Cir. 1988), the court held that under section 522 of DIDA, 12 U.S.C. §1730g(a), a savings and loan institution located in Illinois could export its most-favored lender rate on commercial mortgages to a resident of Texas, a state which has a lower ceiling. This, the court held, was not a usurious practice under Illinois law. The court in Gavey arrived at its result partly in deference to a 1982 advisory opinion of the Federal Home Loan Bank

Board ("FHLBB"). 845 F2d at 521.[37/]

In 1988, staff counsel of the FDIC issued an advisory opinion which also stated that section 521 incorporated Marquette:

> Section 521 preempts State usury laws in two ways. It gives insured State banks the right charge a Federally-prescribed rate on loans. It also says an insured State bank may 'export' its home state's interest rate -- i.e., that the bank

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37/ "[I]t is the view of this Office that the most favored lender status conferred by §522 on insured institutions necessarily includes the export aspect of Marquette." FHLBB General Counsel Opinion Letter (Aug. 6, 1982).

Significantly, however, while section 501 of DIDA expressly granted the FHLBB the power to issue regulations concerning preemption of state usury laws, the regulations which have resulted reflect the limited preemptive intent of Congress: "Nothing in this section preempts limitation in state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers." 12 C.F.R. §590.3(c) (1989). (emphasis added)

> may charge the highest rate allowed in the State where the bank is located, no matter where the borrower may be located.

Opinion of Douglas H. Jones, Deputy General Counsel, FDIC-88-45 (June 29, 1988) Fed. Banking L. Rep. (CCH) §81.110.

The FDIC opinion further stated that the State's right under section 525 to "countermand" federal preemption "belongs to the State where the loan is made. . . . The fact that a State has countermanded under section 525 should not affect the usury preemption of section 521 for a bank not located in that State, so long as the loan is not made in the State that has countermanded." Id.

On its face, this opinion seems to support Greenwood's view that the Commonwealth's having opted-out of DIDA cannot trump Greenwood's right to export

its interest rates pursuant to Delaware law and Marquette. The opinion also noted, however, that the purpose of section 525 was to "preserve principles of federalism. Recognizing that section 521 deprived States of authority over matters traditionally committed to State control, Congress enacted section 525 in order to enable States to recover authority that section 521 had taken away." Id. It seems difficult to square the result reached by the FDIC counsel with his concerns for federalism: that is, why should Massachusetts, a sovereign state, be deprived of authority over the traditional matter of setting its own usury limits on the ground that Congress prohibited Delaware from maintaining laws discriminating against its own state-chartered banks such as

Greenwood?[38/]

38/ Greenwood's heavy reliance on various informal administrative opinions (also known as informal interpretive rules) raises an important question of the weight to be accorded them here. See Greenwood, Exs. A-G.

Federal regulations, as distinguished from informal agency opinions, generally have the same preemptive effect as federal statutes. Wood v. General Motors Corp., 673 F. Supp. 1108, 1114-15 (D. Mass. 1987) (citing Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 [1988]), rev'd on other grounds, 766 F.2d 630 (1st Cir. 1985). Yet even formal agency regulations "can not exceed the statutory authority by going beyond recognized limits to the congressional mandate." Alexander v. Trustees of Boston University, 584 F. Supp. 282, 285 (D. Mass. 1984) (citing Batterton v. Francis, 432 U.S. 416, 428 [1977]). A court reviewing such regulations must "reasonably be able to conclude that the grant of authority contemplates the regulations issued." Id. (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 308 [1979]).

Though interpretations of a statute by officers of the agency charged with its administration are entitled to great deference, Udall v. Tallman, 380 U.S. 1,

(footnote continued)

(footnote continued)

16 (1965), such "traditional deference . . . is not to be applied to alter the clearly expressed intent of Congress". Board of Governors of Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 367 (1986). Interpretive rulings of an agency administrator "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier -- and later -- pronouncements, and all those factors which give it power to persuade, if lacking power to control'." General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 [1944]). See Perdue v. Crocker Nat'l Bank, 702 P.2d at 519.

One benchmark suggested for whether a court properly defers to agency statutory interpretations is whether the interpretation is peculiarly within the expertise of the agency on the one hand, or the court on the other. Breyer, Administrative Law and Policy, 274-88 (1985). Under this standard, the technical expertise in monetary and financial matters of the agencies charged with carrying out DIDA is

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certainly to be respected. On the other hand, Constitutional issues of federalism and preemption are particularly within the court's purview.

Generally, a court has discretion to substitute its de novo interpretation for agency interpretive rules. 2 K. Davis, Administrative Law Treatise, §7:8, pp. 36-37; §7:13, p.59; 1989 Supp. at 247-48 (2d ed. 1979) (citing cases).

In particular, informal interpretive rules written by staff members are generally accorded less weight than the formal interpretive rulings of an agency administrator. See Burke & Kaplinsky at 1098-99 (Agencies such as the FDIC have general interpretive authority under the statutes that were amended by sections 521-23). "It would thus appear that the interpretations of the agencies themselves, as opposed to the interpretations of their staffs, should be given the same degree of deference as Federal Home Loan Bank Board interpretations of section 501 of the Act." FHLBB has explicit statutory authority to promulgate regulations to implement section 501. Compare 12 C.F.R. §590.3(c) (1989) discussed in n.37 above (codified FHLBB regulation stating that preemption under section 501 is limited) with FHLBB staff counsel's advisory opinion relied upon by Gavey.

(footnote continued)

In sum, notwithstanding the scattered suggestions in informal administrative interpretations, Marquette's discussion of the National Bank Act does not teach a general dynamic of ever-expanding preemption or a Congressional strategy of uniform credit regulation which extends irresistibly to displace all state restrictions on state banks. Nor can

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(footnote continued)

Thus, though the brief, informal staff administrative opinions proffered by Greenwood are entitled to the Court's careful consideration, they should not be given conclusive effect. This Court must review them in light of the substantial evidence of DIDA's limited preemptive effect and the stated continued Congressional deference given to state consumer protection laws. They should be weighed with all other evidence probative of Congress' intent.

For a criticism of expansive agency interpretations of preemption in this general area, see generally James G. Kreissman Administrative Preemption in Consumer Banking Law, 73 Va. L. Rev. 911 (1987).

preemption by necessity be implied logically from Gavey, based as it is upon deferential incorporation of FDIC administrative opinions which are themselves contradictory as to the scope of preemption and the breadth of Congressional purpose in enacting DIDA.

5. Exportation of Non-Interest Rate Terms.

Even if it were established that Congress intended to establish full parity between national and state banks and that the Massachusetts opt-out legislation to avoid sweeping preemption was entirely ineffective, the imposition of late charges on Massachusetts credit card customers would still not be assured. The displacement of state law under DIDA's section 521 is limited to "Interest rates" or "the rate allowed by laws of the state," virtually the same language as is found in the National

Bank Act. The Commonwealth argues that "rate" refers to numerical periodic interest rates, while Greenwood understands it to be an inclusive term extending to, "all provisions [including late charges] that affect the economic return 'on a loan' to a lender." (Greenwood's Mem. Supp. Summ. J. at 12-13.) This point is at the heart of the dispute, and it is here that the law is most unsettled and support for Greenwood most attenuated.

As noted above, neither the plain meaning of the terms "rates" and "interest rates" in section 521 of DIDA and section 85 of the National Bank Act, nor the legislative history of section 521 indicate that these terms carry the expansive meaning inferred by Greenwood. Alternatively, it is argued

that an inclusive definition of "rates" is implied by the extension of "most favored lender" status to insured state banks through DIDA and the capacity of such banks to export credit terms through Marquette. (Greenwood's Mem. Supp. Summ. J. at 12-16; Greenwood's Mem. Opp'n. Summ. J. at 13-15.) But the national bank's authorized exportation of lending terms in Marquette (under National Bank Act provisions) like the state bank's exportation in Gavey Properties (under DIDA) was, as a factual matter, strictly limited to numerical interest terms.

Greenwood relies on cases arising under the National Bank Act which did not involve exportation of terms to establish that "'the rate allowed by the laws of the State'" is recognized to

include, "any charge, fee or expense which affect [sic] the economic return a lender may receive." (Greenwood's Mem. Supp. Summ. J. at 7.) The first cited decision, First Nat'l Bank v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975), does not offer an expanded definition of the term "rates," but rather shows only that calculation of chargeable interest rates must take "the case law of the state" into account. Likewise, while the Sixth Circuit in Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855, 864 (6th Cir. 1972) did allow a national bank operating in Michigan to charge closing costs in conformity to Michigan state law governing state banks, it did not determine whether such charges were "interest" or another aspect of "rates."

Greenwood claims Massachusetts law itself supports a flexible conception of chargeable "rates" under DIDA. It notes the collection of an annual credit card fee is allowed in spite of Massachusetts usury laws because such a fee is not a "finance charge" and "bears no relationship . . . to any unpaid balance." Northampton Nat'l Bank v. Attorney General, 8 Mass. App. Ct. 809, 812 (1979) (Grant, J.). Such a ruling is hardly relevant here, however, where Greenwood contends that late charges are collectible precisely because they arise out of or in connection with the lending of money. (Greenwood's Mem. Opp'n. Summ. J. at 2.) Reliance on Rockland-Atlas Nat'l Bank v. Murphy, 329 Mass. 755, 760 (1953), is likewise misplaced, since that case emphasizes

that, "Elimination of all other expenses is an essential and natural part of the legislative scheme for prescribing the allowable rates of interest."

True, some authority supporting a more flexible and inclusive formulation of a chargeable "interest rate" is found in an interpretive ruling of the most favored lender doctrine by the Office of the Comptroller of the Currency ("Comptroller") which provided:

> If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate.

12 C.F.R. §7.7310 (1971) (emphasis added).

While the administrative opinions of the Comptroller are persuasive only,

they do provide a useful framework of analysis, one frequently employed by the courts in "rate" determinations.[39/] Under this analysis, the question is whether a given provision of Delaware lending law is "material" to determining an interest rate and therefore fully exportable by Greenwood to supplant Massachusetts usury law. A broad interpretation of what is "material" is found in Equitable Trust Co. v. Sachs, A-60063/120-1/Fol.713 (Circuit Court of Baltimore City, Md., June 28, 1981 and

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39/ For example, in Partain v. First Nat'l Bank, 467 F.2d 167 (5th Cir. 1972), the Court considered the Comptroller's rulings and opinions as persuasive on the "materiality" determination but saw no need to delve into them since it was clear from Supreme Court precedent that compounding was "material" to the determination of an interest rate and thus home state provisions against compound interest made extraterritorial compounding by a national bank a violation of the National Bank Act.

September 16, 1981), cited in Burke & Kaplinsky, 1106, where the Court allowed a national bank to export an annual credit card fee to a state which prohibited such fees on the ground that the fee was "material" to the determination of "interest" under laws of the bank's home state.
This result is unusual, since such fees have not traditionally been considered as "interest" by courts or state legislatures.
See Northampton Nat'l Bank, 8 Mass. App. Ct. at 813.

The Comptroller has more recently opined that state law provisions defining the "category" or "classification" of a loan are "material" and therefore "exportable" by a national bank under the National Bank

Act. Comptroller Op. Letter no. 178, Fed. Banking L. Rep. (CCH) ¶85,259 (Jan 12, 1981). Late charge provisions would not be material under this analysis since they are not germane to classification of a loan or the computation of numerical interest.

The Commonwealth argues that late charges are functionally distinct from interest since, it says, the imposition or payment of the late charge does not result in Greenwood's forebearance of asserting its right of collection. See Perry v. Stewart Title Co., 756 F.2d 1197, 1207-08 (5th Cir. 1985) (Late charge of 4% on mortgage loan which is merely a bona fide fee for servicing late payments, is "not properly characterized as 'interest'"). Indeed, a Greenwood vice-president recognized

this distinction when he testified at his deposition as follows:

> The payment of a late fee per se does nothing to change the decision on whether we would extend further credit or suspend credit privileges, except that it relates to his overall payment pattern on his account. . . .
>
> . . .
>
> In my mind, finance charge is something that, as a consumer, I would expect to pay for having the privilege of extending my payments over a period of time. If I break my contractual arrangement and default . . . I would expect to either pay a penalty or have the right for someone else to charge me a penalty for the extra cost that they have experienced in trying to enforce their contract with me.

(Stormoen Dep. at 26, 62-63).

In sum, regardless of whether certain finance charges may be exported under Marquette and DIDA, the late charges here at issue do not involve the facilitation of credit which undergirds

the preemption provision of Title V of DIDA. Rather, they implicate a technical default and breach of the cardholder agreement. Whatever may be the merits of the financial or policy arguments that non-rate provisions are "material" to determination of interest rates, Congress regards late charges such as these in a class apart from interest rates generally.

Thus, whatever the merits of Greenwood's case for untrammeled interstate lending, DIDA preemption does not prohibit Massachusetts from enforcing its statute. Greenwood, in effect, asks this Court to take several unwarranted interpretive leaps to conclude that it has met its burden of establishing preemption. Prior case law under the National Bank Act, the

legislative history of DIDA itself, and recent scholarly commentary all demonstrate the unsettled character of the law in this area generally.

Principles of federalism operate with particular force to preserve traditional spheres of state regulation such as consumer protection through usury laws. The Commonwealth is entitled to enforce its laws absent a clear showing of preemption or interference with interstate commerce. The inclusion of a preemption override provision in DIDA, of which Massachusetts took advantage, underscores the presumption that the Commonwealth's law must be given force here. Greenwood has not met its heavy burden of showing preemption, and the Court declines, itself, to create the

sweeping policy of preemption which Congress since 1980 has refused to enact.

B. Choice of Law -- Delaware or Massachusetts?

Balked at preempting the Massachusetts usury law, Greenwood argues that under applicable conflict of laws rules, Delaware substantive law ought apply. Under generally accepted conflicts rules, the forum state (Massachusetts here) applies its own choice of law rules to determine whether its substantive law or that of another state (Delaware here) governs the issue in question. Restatement (Second) of Conflict of Laws §187(3) and cmt. h (1989 Supp.). See, e.g., Bushkin Associates, Inc. v. Raytheon Co., 393 Mass. 622 (1985) (Following the general rule of the Restatement, Massachusetts' choice of law rules applied to determine

whether Massachusetts or New York law applied to enforce an oral contract).[40/]

40/ Under Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941), a federal court in diversity applies the choice of law rules of the state in which it sits, since conflicts issues are matters of state law. Though the primary basis for the Court's jurisdiction here is federal question (to determine the scope of federal preemption under DIDA), the case was also brought pursuant to this Court's diversity jurisdiction. Thus, Klaxon governs the choice of law issue here, and the Court properly looks to the conflicts law of the forum, Massachusetts.

Further, "[b]ecause the Supreme Court has declined to determine the reach of the states' legislative jurisdiction in conflict-of-law situations, the definition of the boundaries has been left to state conflicts rules." Richard J. Bauerfield, Note, Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination, 82 Colum. L. Rev. 1659, 1664 (1982). But see Allstate Ins. Co. v. Hague, 449 U.S. 302, 307-13 (1981), reh. denied, 450 U.S. 971 (1981).

Thus, this Court looks primarily to Massachusetts law to analyze the conflicts issue.

In Bushkin, the leading Massachusetts conflict of laws case, the Supreme Judicial Court of Massachusetts has provided some general guidance with respect to conflict of law, though it has not addressed the type of issue involved here. Thus, this Court must determine how it believes the Supreme Judicial Court would rule on the question at hand. In Bushkin, the court rejected traditional single-factor choice of law doctrine, such as the place of the making of the contract, or the State with the greatest "interest" in the issue, and instead used a broad, "functional" approach that looked to "various choice-influencing

considerations." Id. at 630-31; see Travenol Laboratories, Inc. v. Zotal, Ltd., 394 Mass. 95, 99 (1985). See also Shinberg v. Bruk, 875 F.2d 973, 975 (1st Cir. 1989); Bi-Rite Enterprises, Inc. v. Bruce Miner Co., 757 F.2d 440, 442-43 (1st Cir. 1985); Choate, Hall & Stewart v. SCA Services, Inc., 378 Mass. 535, 540-41 (1979).[41/]

41/ As Bushkin noted, "[al]most all states have abandoned the lex loci rule." Bushkin, 393 Mass. at 630-31. Implicit in this statement is a rejection as outdated of the reasoning in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 407 (1927), which held that a contract for interest exceeding another state's usury limit was enforceable if the state where the contract was made permitted it. Thus, even assuming that the Cardmember Agreement here was made in Delaware, that fact cannot be dispositive as to whether Delaware or Massachusetts substantive contract law applies to an issue of usury. Indeed, Greenwood does not insist that Delaware law must be applied solely on the ground that the Agreement was made in that State.

For guidance, the court in Bushkin looked to the general choice of law principles set forth in section 6 of the Restatement (Second) of Conflict of Laws (1971) and to R.A. Leflar, American Conflicts Law (3d ed. 1977).42/

The issue in Bushkin was whether the Massachusetts or the New York Statute of Frauds should be applied to an alleged oral agreement between two parties where

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42/ Section 6(1) of the Restatement states that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." Massachusetts' general conflict of laws statute permits parties contractually to agree that the law of either Massachusetts or another state shall govern, "when a transaction bears a reasonable relation to this state and also to another state . . ." Mass. Gen. L. ch. 106 §§1-105(1); Massengale v. Transitron Elec. Corp., 385 F.2d 83, 86 (1st Cir., 1967). The parties here do not appear to dispute that the Cardmember Agreement bears a reasonable relationship to both Delaware and Massachusetts; the question is which state's law should prevail.

such an agreement was barred under the New York statute, but not under the Massachusetts statute. Unlike the case at hand, however, the parties in Bushkin were business entities engaged in a commercial contract who had not specified a choice of law therein. These crucial factual differences limit the precedential effect of Bushkin to its multi-factor analysis.

The issue here is rather whether Massachusetts law applies to prohibit Greenwood from enforcing the late charge provisions of the Discover Cardmember Agreement, notwithstanding the choice of law provision of the Agreement. That provision specifies that the Agreement "will be governed by the laws of the State of Delaware and applicable federal laws." Under the Delaware statute, a

credit card issuer located in Delaware may contract with cardmembers to charge any agreed-to interest rate, plus late payment fees on unpaid balances. Del. Code Ann. tit. 5, §§943, 950 (1990).

Emphasizing the disparity in bargaining power between Greenwood -- the Discover Card colossus -- and a credit card applicant, the Commonwealth maintains that "Massachusetts will not enforce a contractual choice of law clause where it is one of the 'boiler plate' terms in an adhesion contract between parties of disparate bargaining power." (Commonwealth's Mem. Opp'n. Summ. J. at 15.) It cites Ernest & Norman Hart Bros., Inc. v. Town Contractors, Inc., 18 Mass. App. Ct. 60, review den. 392 Mass. 1103 (1984), and In Re Maxcy, 45 B.R. 268, 270 (Bankr. D.

Mass. 1985) for this proposition, but neither of those cases clearly establish that adhesion contracts are per se unenforceable under Massachusetts law. In Ernest, a contract between a Massachusetts subcontractor and a Connecticut subcontractor contained both a choice of forum clause that "Connecticut law shall have jurisdiction in disputes between the parties" and a choice of law clause that "[t]he law of the place of the building (Massachusetts) shall govern." Id. at 62. The court treated the first clause as one for forum selection and refused to enforce it primarily on waiver grounds, although it also noted that the contract was one of adhesion. Id. at 66-68. The Massachusetts Appeals Court recognized, however, that the modern

view holds forum selection clauses generally enforceable, citing Fireman's Fund American Ins. Co. v. Puerto Rican Forwarding Co., 492 F.2d 1294, 1296-97 (1st Cir. 1974). Ernest at 64-65.[43/] In Maxcy, the Bankruptcy Court refused to enforce a contract primarily on a ground other than adhesion, though it used adhesion as an alternative basis for its holding. The Bankruptcy judge simply asserted that adhesion contracts are unenforceable, however; he engaged in no analysis of Massachusetts law. This Court finds these decisions unpersuasive.

43/ See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-11 (1972); Allstate Insurance Co. v. Hague, 449 U.S. 302, 324, n. 11 (1981) (Choice of law analysis applies where there is no forum selection clause; the "justifiable expectations" of contracting parties remain a major concern).

Contrary to the Commonwealth's assertions, the law in Massachusetts is that generally a court will not deny enforcement of a contract of adhesion unless it is unconscionable or in some other way fundamentally unfair. See Santos v. Lumbermen's Mutual Casualty Co., 408 Mass. 70, 86 (1990); Lechmere Tire & Sales Co. v. Burwick, 360 Mass. 718, 720-21 (1972).[44/]

This is the approach of the Restatement (Second) of Conflict of Laws (1989 Supp.), which Massachusetts decisions follow without exception since Bushkin. Under the Restatement, a contract of adhesion is enforceable

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44/ But see Edith Fine, Massachusetts Contract Cases and Choice of Law, 43 Mass. L. Q. 46, 48-49 (1958) (Citing older Massachusetts cases in which choice of law provisions in insurance contracts were disregarded, apparently on the ground that they constituted adhesion contracts).

unless the consent of the adherent was "obtained by improper means, such as by misrepresentation, duress, undue influence, or by mistake." Restatement, §187 cmt. b. There is no such evidence here. True, section 187 of the Restatement permits a Court to consider, as one factor, whether a choice of law provision is found in an adhesion contract, "namely one that is drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." Restatement, §187 cmt. b. Though "[c]hoice-of-law provisions contained in such contracts are usually respected . . . the forum will scrutinize such contracts with care and will refuse to

apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent." Id.

Here, while the Cardmember Agreement is a contract of adhesion, its provision for late charges is neither unconscionable nor does it result in substantial injustice to the adherent. What's more, in view of the protection of the Commonwealth's consumer disclosure statute, Mass. Gen. L. ch. 140, §114C, the Court rules that the consent of the cardholders to such charges was not obtained by improper means.

Here, the choice of law provision unmistakably directs the parties to the law of Delaware. Still, analysis cannot end at this point. Under section 187(2)

of the Restatement, "The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . .

> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in determination of the particular issue and which, under the rule of §188, would be state of the applicable law in the absence of an effective choice by the parties.

Under the Restatement, "[the] forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule and whether the other state has a materially greater interest than the state of the chosen law in the determination of the particular issue." Restatement §187, cmt. g. See Kronovet v. Lipchin, 415 A.2d 1096, 1105 (Md. 1980) (citing §187). Thus, under

section 187, a key consideration is whether the Commonwealth's usury statute, particularly its prohibition of late charges, amounts to a fundamental policy which it has a materially greater interest in enforcing than the policy by which Delaware permits a bank located in that state to assess late charges as interest.

The Commonwealth claims that under section 187(b) of the Restatement the Massachusetts usury statute itself expresses the "fundamental policy" of Massachusetts, a policy which outweighs Delaware's interest in permitting its banks to assess late charges in foreign states. This Court agrees.

Not every statutory enactment expresses a fundamental policy. "On the other hand, a fundamental policy may be

embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power." Restatement §187, cmt. g. See, e.g., Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 63, 67 (S.D.N.Y. 1975) (Despite agreement that New York Law apply, New Jersey has a strong public policy to protect relatively powerless consumer or small businessperson from more powerful commercial giants); O'Brien v. Shearson Hayden Stone, Inc., 586 P.2d 830, 833-34 (Wash. 1978), on recons., 605 P.2d 779, 780-83 (Wash. 1980) (Disregarding a choice of law provision in a broker's contract and holding that the state of Washington has a materially greater interest in protecting its

consumer-citizens than New York has in charging interest to Washington citizens); North American Bank, Ltd. v. Schulman, 474 N.Y.2d 383, 386-87 (Co. Ct. 1984) (Foreign law chosen permitted usury against a fundamental policy of the forum); Whitaker v. Spiegel, Inc., 623 P.2d 1147, 1153-54 (Wash. 1981), app. dismd. Spiegel, Inc. v. Whittaker, 454 U.S. 958 (1981). Turner v. Aldens, Inc., 433 A.2d 439, 442-44 (N.J. Sup. A.D. 1981) (Usury provision of New Jersey Retail Installment Sales Act applied to out-of-state creditors despite silence of statute and choice of law clause to the contrary in an adhesion contract, in view of the evil legislature sought to remedy).

In light of the significant body of authority on this point and the evident concern of Massachusetts with the

protection of its consumers generally, and through its usury statute in particular, this Court rules that Massachusetts law applies in the premises notwithstanding the contrary choice of law provision.

B. The Reach of Massachusetts Usury Restrictions Under Mass. Gen. L. ch. 140, §114B

Greenwood has one last arrow in its quiver. It lets fly with the brief contention which it touched on in oral argument that Mass. Gen. L. ch. 140, §114B does not prohibit Greenwood's conduct here. The parties have examined the express terms of section 114B and dispute whether its prohibition on late charges applies to unmentioned out-of-state lenders, such as Greenwood.

As discussed above, in 1981 Massachusetts joined a number of states which, in response to national bank

deregulation and tightened local credit, substantially amended their usury statutes to preserve the competitive position of state-chartered financial institutions.[45/] Among other measures, Massachusetts raised its usury limit from 12% to 18% on open end credit accounts, a category which includes credit cards. Mass. Stat. 1981, ch. 384, §1, amending Mass. Gen. L. ch. 140, §114B.[46/] This same statutory amendment also provides: "No creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to such an open end credit plan."

45/ See, e.g., Usury Lending Limits Hearings.

46/ See Mass. Stat. 1984, ch. 489, §1 for a subsequent amendment not here relevant. See note 17, supra.

The Commonwealth argues that Greenwood is prohibited by these express terms from imposing on Massachusetts customers the late charge provision in Greenwood's Cardmember Agreement. That Agreement is also challenged as unlawful for imposing "unfair multiple payments for single defaults" since "notwithstanding the late charge, a credit card lender continues to charge and accrue interest on all delinquent accounts."47/ This is said to constitute double-charging in excess of

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47/ Commonwealth's Mem. Sup. Summ. J. at 10 n.7. The Commonwealth makes this argument in the context of a complex technical discussion of the preemption issue, specifically case law interpreting the National Bank Act and the historical relationship between interest rates and noninterest charges, such as late payment fees. The intricacies of that discussion are not relevant to the legislative interpretation required here.

the 18% usury limit on open-end credit card accounts.

The Massachusetts statute, section 114B, is silent as to whether its late charge prohibition reaches out-of-state creditors. The Commonwealth argues that, since the reach of the statute is not by its terms restricted, it must extend to all creditors, in and out of state. It contends, "[t]he contrary interpretation requires the conclusion that the Legislature sought to prohibit late fees but failed to enact a statute which achieved this purpose for many Massachusetts consumers." Commonwealth's Reply at 12. This is hardly the Commonwealth's strongest argument and Greenwood at once counters that, because the provisions of another consumer statute in Massachusetts, Mass. Gen. L. ch. 255D, §1, do expressly

contemplate extraterritorial reach, the silence of section 114B indicates legislative intent that it not have the same effect or, at a minimum, demonstrates an ambiguity that requires resort to the legislative history of the crucial amendment to §114B -- Mass. Stat. 1981, ch. 384. Greenwood's Mem. Sup. Summ. J. at 15-16.[48/]

48/ Chapter 255D of the Massachusetts General Laws, enacted as part of Massachusetts' earliest consumer protection legislation in 1966, covers retail installment sales agreements (generally treated as purchase money security interests), as well as revolving credit agreements, such as department store credit agreements which contemplate repeated transactions and a revolving balance on finance charges. See, e.g., Herbert P. Wilkins, Revolving Credit Agreement, Retail Installment Sales, 51 Mass. L. Q. 233 (1966). Section One of chapter 255 excludes from the definitions of both types of agreements "an agreement signed by a nonresident buyer in the commonwealth if the buyer has agreed that the law of his state shall apply." This provision does

(footnote continued)

This Court has pursued this last line of inquiry, finding that the preponderance of available evidence indicates that the Massachusetts sponsors and supporters of section 114B, not unlike the Congressional sponsors of section 521 of DIDA, were primarily preoccupied with raising the numerical interest rate ceiling for Massachusetts-chartered banks so that they could compete effectively with other banks.

While Massachusetts legislative history is notoriously sparse, the record of debate and discussion concerning Mass. Stat. 1981, ch. 384 does exist, albeit in unofficial

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(footnote continued)

not support Greenwood, since it merely declines to extend Massachusetts' law to consumers who happened to reside in other states.

form.[49/] The minutes of the Massachusetts Senate floor debate concerning the bill that became Mass. Stat. 1981, ch. 384, while limited, do shed considerable light on the purposes of the statute.[50/]

The record of the enacting legislative session indicates that the fundamental purpose of Mass. Stat. 1981, ch. 384, §1 was to raise the ceiling on

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49/ In Massachusetts, the official Senate and House Journals contain only a record of action taken but no summary of debate. Similarly, there are no formal transcripts of Committee hearings. However, since the early 1970's, a news bureau, the State House News Service ("SHNS"), provides in the form of press releases unofficial records of action and selective debate from many, though not all, daily legislative sessions. Fortunately, SHNS recorded coverage of the floor debate of the bill that became Mass. Stat. 1981, ch. 384. In the absence of an official record, the SHNS releases are parsed here.

50/ SHNS, May 26, 1981, pp. 2-3; May 27, 1981, pp. 2-6.

finance charges Massachusetts-based credit card issuers could impose on open end credit accounts, in an attempt to dissuade such issuers from moving their operations out of state.[51/]

51/ Chapter 384 went into effect just prior to the effective date of the Massachusetts legislature's override of the federal preemption provisions of DIDA, though the legislature had acted to override DIDA before enacting the 1981 amendment to the usury law. The preemption override, approved June 4, 1981, became effective on September 4, 1981. Mass. Stat. 1981 ch. 231, "An Act Exempting the Commonwealth From the Usury Preemption Provisions of the Nineteen Hundred and Eighty Deregulation and Monetary Control Act." The amended usury statute, Chapter 384, was approved August 6, 1981 and became effective by emergency declaration of the Governor on August 19, 1981. Mass. Stat. 1981, ch. 384.

Section 2 of Chapter 384 for the first time regulated charge card agreements. That section was codified as Mass. Gen. L. ch. 255, §12H. Under section 12H charge card agreements contemplate no periodic finance charge but rather payment in full upon receipt

(footnote continued)

As sponsor of the bill which ultimately became Chapter 384, Senator John A. Brennan proposed the legislation as a compromise between those on the one hand who wanted no interest rate higher than the then-applicable 12%, and the banking industry on the other which argued for total deregulation.[52/]

(footnote continued)

of a monthly billing. Mass. Stat. 1981 ch. 384, §2, codified as Mass. Gen. L. ch. 255, §12H.

52/ SHNS, May 26, 1981, p.2. While the banking industry wanted total deregulation (See, e.g., 1981 House J., H-1233, deregulating finance charges on open end credit plans and providing for "[annual percentage rate] not in excess of that agreed upon by creditor and customer"), Senator Jack Backman charged that the Brennan amendment was overindulgent to the banks. Id. Senator John Parker, on the other hand, thought the amendment was "trying to take care of delinquent card holders." Id. at 4. Senator Brennan argued that his proposal was "a compromise. It serves both banks and consumers." Id.

Senator Brennan argued that some increase in the interest rate was necessary to forestall the flight of banks from Massachusetts to other states where higher interest rates were permitted:

> Brennan continued saying a number of states do not restrict banks from marketing cards in Massachusetts. In state customers are being charged 19 to 20 percent he said, because other states do not restrict issuers. Brennan claimed the realities of the situation are that many in state issuers will begin to move out of state if they can find unlimited interest rates. Brennan said state banks originally wanted unlimited rates in Massachusetts, but the Banks and Banking Committee worked up this compromise and agreed to put the limit up to 18%.

SHNS, May 27, 1981, p.5.

More significant, Senator Brennan pleaded for action on his compromise on the ground that, if Massachusetts lenders moved their operations to states with less restrictive laws,

Massachusetts would be unable to control the charges banks in those states could impose on its residents:

> Senator Brennan said the U.S. Supreme Court decided that the National Banking Act precludes state regulators from regulating banks chartered to do business in another state. He said he hopes the bill is not recommitted.

Id. at 5. The Brennan amendment was then adopted. Id. at 6.

It is a compelling inference that Senator Brennan was referring to the 1978 Marquette decision. It thus appears clear that the chief sponsor of the statute increasing the usury limit thought out-of-state banks beyond its reach.

The record points to the overriding concern of the Massachusetts legislature: viz. to provide Massachusetts banks with interest rates closer to those which banks could obtain

in some other states, yet to cap those rates at 18%. There appears to have been no discussion about precluding out-of-state banks from charging higher rates or imposing late charges on Massachusetts residents. Chapter 384, instead, was enacted to keep Massachusetts-based banks in Massachusetts while continuing to protect consumers through limitations on rates and charges. There is no direct evidence that the Massachusetts legislature ever considered the possibility that it might possess the authority to impose the terms of section 114B on out-of-state banks.[53/]

53/ The Court notes that prior to the passage of the Brennan amendment, the Massachusetts Senate in 1981 authorized a study of the impact of late charges specifically upon the availability of

(footnote continued)

The evil sought to be addressed by this legislation was the potential exodus of Massachusetts card-issuing banks to other states.

This is not to suggest that the

(footnote continued)

consumer credit and upon lenders. S. 20, proposed by Senator Robert Buell, an opponent of the Brennan amendment, provided:

> Resolved that the Joint Committee on Banks and Banking is authorized to investigate interest rates on credit cards, fees attached thereto, and consider the matter of free periods, imposition of late charges and delinquency charges and all other matters pertaining to credit cards. The Committee shall report the results of such study, if any, and drafts by June 30, 1981.

S. 20.

The Court has been unable to determine whether the S.20-authorized study was actually carried out; at least the Court has discovered no published version. Such a study might enlighten the Court as to the significance of late charges generally, though it seems extremely doubtful that such a study, if it existed, would point to a contrary result here.

Massachusetts Legislature was unconcerned about late charges or that the prohibition on late charges was unthinking surplusage. The record of enactment of Chapter 384 indicates legislative concern that either a charge card issuer or a card issuer pursuant to an open end credit account could, by imposing late charges upon a borrower's failure to make payments due in full, exceed the 18% usury limit established in the Act.

Senator Brennan expressed particular concern over the announced intention of American Express to impose late fees of 2.5% on balances due over 60 days on its charge card customers, or 25% per annum. SHNS, May 26, 1981, p.2; May 27, 1981, p.5. Sen. Brennan claimed that though his amendment would raise interest rates by 6%, it would save

Massachusetts consumers 7% by capping rates at 18%. Id., May 27, 1981, p.5.

These same concerns are echoed in a joint resolution of the legislation with an accompanying news release prepared in October of 1981 (after passage of section 114B). There, Massachusetts legislators described the banking statutes recently enacted during the 1981 legislative session (including section 114B) as indicating the Commonwealth's ". . . desire to retain control of its interest rate statutes by over-riding Title V [of DIDA]"; and called for rejection of proposed Congressional bills (S-1406 and HR-2501)[54/] which would "preempt state laws expressly limiting the nature,

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54/ See, C.I.S., Annual Abstract, 1981, S-241-46, pp.666-67.

rate, amount of or manner in which interest finance charges or other fees may be charged." SHNS, October 6, 1981. Representative Antoine Aguiar, Chairman of the Massachusetts Joint Committee on Banks and Banking, was outspoken in opposition to the additional preemption bills or the weakening of Massachusetts usury laws, declaring:

> The money lenders are now seeking the wholesale repeal of state usury laws. . . . In addition to giving money lenders nation-wide carte blanche to follow the lead of these [deregulating] states [e.g. Delaware], the [proposed] federal legislation also eliminates all prohibition on fees imposed by lenders. . . . These are the notorious hidden charges that we have fought for years to eliminate. . . . Consumers will no longer be able to comparison shop if federal preemption occurs.

SHNS, October 26, 1981.

The Legislature's joint resolution against further preemption and Senator

Aguiar's opposition to weakening state restrictions on "hidden charges" presumably includes protection against late charges. These declarations thus imply that Massachusetts legislators believed their newly enacted usury reforms (including section 114B) effectively protected Massachusetts citizens against the deregulated lending practices allowed in states like Delaware or proposed in preemption legislation then before Congress.

The after-the-fact rationalizations for legislative action provide, however, no sure footing for analysis and are widely considered unreliable as a source of legislative interpretation. See United States v. Wise, 370 U.S. 404, 411 (1962); Bobsee Corp. v. United States, 411 F.2d 231, 237 n.18 (5th Cir. 1969);

Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 731 (9th Cir. 1978). See also R. Dickerson, Interpretation and Application of Statutes, 179-80 (1975); Sutherland, Statutory Construction, §49.11 at 414-15 (4th ed. 1984). Greenwood argues that there are other more reliable indicia which support the conclusion that section 114B was never intended to apply to out-of-state lenders.

First, Greenwood argues that Massachusetts policy with respect to late charges cannot be a fundamental legislative goal since other consumer statutes in the Commonwealth either permit late charges or allow interest rates higher than the 18% cap found in section 114B (e.g., retail installment sales agreements and charge card

accounts). As to late charges, this argument ignores the fact that no finance charge is assessed on charge card accounts at all. Further, higher rates of interest under retail credit agreements typically are not prohibited by state usury statutes, since the merchant is primarily in the business of selling goods or services, not loaning money. See Curran, Legislative Controls as a Response to Consumer-Credit Problems, 8 B.C. L. Rev. 409, 413-415 (1967). Thus, Greenwood's argument in this respect is unpersuasive.

Second, Greenwood notes that the provisions of a related Massachusetts consumer protection statute, Mass. Gen. L. ch. 140, §144C, enacted in 1987 by Mass. Stat. 1987, ch. 565, required out-of-state issuers of credit cards to

disclose to customers any rates or charges imposed above the Massachusetts limits, and ordered state agencies to educate local consumers as to comparative rates and charges for both in-state and out-of-state banks.[55/] Section 114C did not, however, directly prohibit such elevated charges and rates by foreign lenders.

Greenwood stresses that since section 114C contained express terms making it applicable to out-of-state issuers of credit cards, in contrast to the silence of section 114B in that regard, by implication section 114B was not intended to apply to out-of-state

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55/ Section 114C also provides that a card issuer "whether located within or without the commonwealth, may assess an annual fee," subject to certain requirements for creditor notice and consumer entitlement to cancellation and refund without penalty.

creditors. Section 114C, however, was passed six years after section 114B, and therefore it cannot shed light on the legislative intent of the earlier statute. See, e.g., Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) ("[A]rguments predicated upon subsequent Congressional actions must be weighted with extreme care [but] not rejected out of hand"); Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (Subsequent enactments and statements of Congress regarding restrictions on subsidized national flag vessels "cannot override the unmistakable intent" of the enacting Congress). Nor is it clear, logically, that section 114C supports Greenwood's statutory construction of section 114B's territorial reach, since section 114C, unlike section 114B which expressly

restricts late charges, just as expressly countenances an annual fee.[56/] On its face, section 114C expresses a non-discriminatory intent to treat out-of-state credit card issuers similarly to their in-state counterparts. The enactment of section 114C, therefor, sheds little light on the interpretation to be afforded to section 114B.

Greenwood's conclusion that section 114B was not intended to reach beyond Massachusetts' borders is buttressed, however, by the fact that the Commonwealth has presented no evidence

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56/ It will be remembered that the Massachusetts Appeals Court had previously held that a national bank located in Massachusetts could assess an annual fee in addition to the maximum allowable finance charge, interpreting such fees as independent of the method of calculating finance charges. Northampton Nat. Bank v. Attorney General, 8 Mass. App. Ct. 809 (1979).

of any previous attempts to enforce section 114B in such a way as to reach either interest rates or late charges imposed by out of state banks upon Massachusetts residents. Indeed, during the eight years prior to the filing of the present suit, out-of-state banks routinely charged interest rates to Massachusetts residents higher than the 18% cap permitted to Massachusetts banks.[57/]

57/ See Office of Commissioner of Banks, Quarterly Credit Card Issuer's Report, June 30, 1990. The official quarterly reports issued by the Commissioner are expressly required by the Massachusetts credit card disclosure statute. Mass. Gen. L. ch. 140, §114C. The most recent 23-page report lists several hundred in state and out of state credit card issuers and clearly illustrates the slight percentage differential in interest rates charged by in state and out-of-state banks to Massachusetts cardholders. The report does not list Greenwood Trust Company.

(footnote continued)

This, of course, is precisely the result one would expect following the Marquette decision with respect to out-of-state national banks. The evidence before the Court thus proves little more than that the Massachusetts banking authorities are complying with

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(footnote continued)

The report includes data with respect to annual percentage rates, grace periods, annual fees, and "other fees." Other fees are not further delineated. However, the Court notes that the underlying data form sent to credit card issuers in and out of the Commonwealth requests each issuer to list "Amounts of fees charged (if any)," and then includes spaces for annual fee, cash advance fee, late charge, over limit fee, and any other fees. The form may be obtained from the Office of the Commissioner of Banks.

The Office also publishes a quarterly newsletter which summarizes the results of the Card Issuer's Report and gives general advice to consumers to consider the relative advantages and disadvantages of each card issuer's terms.

the National Bank Act as interpreted in Marquette. Such evidence cannot be bootstrapped into a contemporaneous regulatory construction of an allegedly ambiguous statute.

For, in the final analysis, Mass. Gen. L. ch. 140, §114B is not ambiguous. While the Court has extended this opinion to analyze each of Greenwood's contentions, that analysis -- undertaken out of an excess of caution in light of the importance of the issue presented -- ultimately adds nothing to the plain language of the statute. The Massachusetts legislature has simply and unequivocally barred credit card late charges. There is, upon reflection, no occasion to go behind the plain language to speculate upon the policy motives behind this legislative mandate. Enough said.

IV. CONCLUSION

For all the foregoing reasons, the Court holds 1.) that the provisions of DIDA do not preempt the Massachusetts usury law; 2.) Massachusetts, not Delaware, law applies in the premises; and 3.) the prohibition on credit card late charges reaches out-of-state credit card issuers such as Greenwood.

Accordingly, Greenwood's motion for summary judgment is DENIED, and that of the Commonwealth is ALLOWED. As there is thus no occasion to consider the damages issue, judgment shall enter for the Commonwealth and its Attorney General. The parties shall submit a proposed form of judgment.

WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREENWOOD TRUST COMPANY, Plaintiff,	)	
v.	)	CIVIL ACTION No. 89-2583-Y
THE COMMONWEALTH OF MASSACHUSETTS, and JAMES M. SHANNON, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	

SUPPLEMENT TO
THE COURT'S MEMORANDUM AND ORDER OF
OCTOBER 22, 1991

The Court, in its discretion, finds that final judgment should be entered with respect to those claims addressed in the Court's Memorandum and Order of October 22, 1991 ("the Order") pursuant to Fed. R. Civ. P. 54(b) or, alternatively, that the issues addressed in the Order should be certified for

immediate appeal under 28 U.S.C. §1292(b).

As grounds therefore, the Court finds that after the Order, the only claim remaining for resolution in this action is the Counterclaim brought by the Defendants ("the Commonwealth") pursuant to Massachusetts General Laws c. 93A and the only other issues to be addressed by this Court are those relating to the Commonwealth's claims for injunctive relief, restitution, civil penalties, and other remedies. All other claims that have been brought by the parties have been fully and finally adjudicated and resolved.

An immediate appeal would aid in the efficient resolution of this case because the Commonwealth's remaining claim under Chapter 93A is only viable, as a matter of law, if the Court is

upheld with respect to its analysis in the Order. This is also true with respect to the remaining matter of the Commonwealth's claims for injunctive relief, restitution, civil penalties, and other remedies. The Court recognizes that the issues involved in the cases are novel and complex.

Pursuant to Fed. R. Civ. P. 54(b), therefore, the Court determines that there is no just reason for delay in certifying the judgment to be entered by the Court, with respect to the claims which have been resolved by the Order, as final and expressly directs the entry of final judgment as to those claims.

Moreover, pursuant to 28 U.S.C. §1292(b), the Court finds, in the alternative, that if Fed. R. Civ. P. 54(b) does not apply to any claim or claims relating to the Order, then with

respect to that claim or claims the Order: (1) involves controlling questions of law; (2) substantial grounds for difference of opinion exist on those questions; and (3) an immediate appeal from the Order may materially advance the ultimate termination of the case.

This Court further orders that by agreement of the parties and with the approval of the Court:

1. Greenwood Trust Company ("Greenwood") shall keep accurate records of all late charges both charged and collected by Greenwood from Discover Card cardmembers residing in Massachusetts after October 22, 1991. If the appeal, after all avenues of appeal have been exhausted, is decided in favor of the Commonwealth, then Greenwood shall pay back, within a

reasonable period of time, all such late charges which have been charged and collected, plus simple interest at an annual rate of 12% from the time of collection of each such late charge, to its respective Massachusetts Discover Card cardmembers. Such payments by Greenwood shall constitute full and final settlement of any and all claims brought by the Commonwealth against Greenwood in this suit with respect to all late charges both charged and collected after October 22, 1991. Any late charges, plus interest, for the period after October 22, 1991 through the date that all avenues of appeal have been exhausted, which cannot be returned to the respective Massachusetts Discover Card cardmembers (because of death or disappearance of the respective cardmember or for any other reason)

shall be paid to the Local Consumer Aid Fund.

2. If, after all avenues of appeal have been exhausted, such appeal is decided in favor of the Commonwealth, the parties shall then meet and prepare a Supplemental Case Management Order to address the remaining issues raised by the Commonwealth's Counterclaim under Massachusetts General Laws c. 93A, §4 with respect to late charges which have been either charged and/or collected prior to October 22, 1991.

_____

Dated:

No. 92-794

Supreme Court, U.S.
FILED
DEC 4 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.,
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT GREENWOOD TRUST COMPANY

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QUESTION PRESENTED

Whether a late charge which a federally insured state bank imposes when a credit cardholder fails to make timely payment of a minimum monthly installment of an outstanding balance constitutes "interest" within the meaning of Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. §1831d, the federal usury statute applicable to such banks.

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RULE 29.1 STATEMENT

Respondent Greenwood Trust Company is a wholly-owned subsidiary of Sears Consumer Financial Corporation, a wholly-owned subsidiary of Dean Witter Financial Services Group Inc. Dean Witter Financial Services Group Inc. is a wholly-owned subsidiary of Sears, Roebuck and Co.

No. 92-794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.,
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT GREENWOOD TRUST COMPANY

PRINCIPAL STATUTORY PROVISIONS INVOLVED

Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, codified as Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d(a), provides in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions, . . . such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located. . . .

Section 85 of the National Bank Act, 12 U.S.C. §85, provides in pertinent part:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located. . . .

Del. Code Ann., Tit. 5, §950, provides in pertinent part:

> If the agreement governing a revolving credit plan so provides, a bank may impose, as interest, a late or delinquency charge upon any outstanding unpaid installment payments or portions thereof under the plan which are in default. . . .

STATEMENT

Respondent Greenwood Trust Company ("Greenwood") is a federally insured bank chartered by the State of Delaware. It issues its "Discover Card" to cardmembers throughout the country, including cardmembers residing in Massachusetts. While Greenwood does not impose on Discover Cardmembers an annual fee (or various other fees typical in the credit card industry), it does charge a $10 fee if a cardmember fails to make his or her minimum monthly payment of an outstanding balance within 20 days after the due date (*i.e.*, within 45 days after the billing date). This fee is clearly and conspicuously disclosed to prospective cardmembers with the application for a Discover Card and is set forth in the Discover Cardmember Agreement.

Greenwood imposes its late charge on an interstate basis in reliance upon Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), codified as Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d(a), which authorizes a federally insured state bank such as Greenwood to charge "interest" on its loans at "the rate allowed by the laws of the State . . . where the bank is located." Greenwood is located in Delaware, whose laws authorize the late charge at issue. Del. Code Ann., Title 5, §950. Section 521 of DIDA applies "notwithstanding any State constitution or statute which is hereby preempted . . . ."

The Commonwealth of Massachusetts and its Attorney General (the "Commonwealth") have asserted that a Massachusetts statute prohibits Greenwood from imposing a late charge on Massachusetts cardmembers. However, the First Circuit Court of Appeals reversed a decision of the district court in favor of the Commonwealth. The First Circuit unanimously held that Greenwood's late charge is "interest" under Section 521 and that the Massachusetts statute is therefore overridden by Section 521's express preemption provision.

Section 521, the federal usury statute applicable to federally insured state banks, has its genesis in Section 85 of the National Bank Act, 12 U.S.C. §85, the federal usury statute applicable to national banks. Since 1864, Section 85 has authorized national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . . ."

In the 116 years between the enactment of Section 85 in 1864 and the enactment of Section 521 in 1980, this Court, the courts of appeals and other courts have interpreted Section 85 on numerous occasions. In 1874, in *Tiffany v. Nat'l Bank of Missouri,* 85 U.S. (18 Wall.) 409 (1874), this Court articulated the "most favored lender" policy embedded in Section 85. That policy provides that a national bank may impose the interest charges available to the "most favored lender" under the law of the bank's home state. It is designed to protect national banks against the possibility of state legislation favoring other lenders over national banks. Following *Tiffany,* this Court and other courts have uniformly concluded that Section 85 incorporates the entire usury law applicable to the "most favored lender" in the state where a national bank is located and that a wide variety of loan-related charges constitute "interest" under Section 85. In 1978, in *Marquette Nat'l Bank v. First of Omaha Service Corp.,* 439 U.S. 299 (1978), this Court unanimously held that Section 85 empowers a national bank to export the interest charges permitted by the laws of its home state to credit card customers residing in another state, regardless of more restrictive usury laws of the other state.

Just two years after *Marquette,* Congress enacted Sections 521-523 of DIDA.[1] Using language taken virtually verbatim from Section 85, Section 521 authorizes federally insured state banks to charge interest "at the rate allowed by the laws of the State . . . where the bank is located . . . ." The preamble of Section 521 states that Section 521 is enacted "to prevent discrimination against State-chartered insured depository institutions . . . ," and the legislative history of Sections 521-523 shows that Congress intended to extend the same federal usury authority long exercised by national banks under Section 85 to all other federally insured depository institutions. Thus, the courts and federal banking agencies have uniformly concluded that Sections 521-523 confer on other federally insured depository institutions precisely the same "most favored lender" and exportation rights conferred on national banks by Section 85. In its Petition, the Commonwealth has not contested the First Circuit's conclusion that Sections 85 and 521 should be interpreted *in pari materia.*

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1. Section 522 of DIDA, 12 U.S.C. § 1463(g), dealing with federally insured savings institutions, and Section 523 of DIDA, 12 U.S.C. §1785(g), dealing with

SUMMARY OF ARGUMENT

The First Circuit's decision does not plow any new ground. Instead, it is the latest in a long and unbroken line of decisions that uniformly have held a wide variety of fees and charges to constitute "interest," rejecting the argument, now made by the Commonwealth, that "interest" as used in Section 521 and Section 85 should be construed to encompass only percentage-based periodic interest charges. Neither this Court, any court of appeals nor any state court of last resort ever has construed "interest" in Sections 521-523 of DIDA or Section 85 of the National Bank Act in the manner urged by the Commonwealth, and thus there is no conflict of authority that requires this Court's resolution.

Moreover, the First Circuit's decision accords with the position of the federal banking agencies, each of which holds the view that late charges constitute "interest" for purposes of Sections 521-523 of DIDA and Section 85. Indeed, the Federal Deposit Insurance Corporation (the "FDIC"), which is responsible for administering and enforcing the Federal Deposit Insurance Act, filed an *amicus curiae* brief in the First Circuit asserting that Greenwood's late charge constitutes "interest" under Section 521 and that the district court's holding to the contrary should therefore be reversed.[2] The Office of the Comptroller of the Currency (the "OCC") specifically authorized the FDIC to state in its brief that the OCC concurred with the analysis of Section 85 contained in that brief.

The decision below does not have the practical significance ascribed to it by the Commonwealth. Since 1978, when this Court decided *Marquette,* there has been no question as to the right of national banks to export their percentage-based periodic interest charges under Section 85 to cardholders in other states. State banks have exported such charges since 1980, a practice the Commonwealth concedes is legitimate under Section 521 and *Marquette.* (Pet. 19 and n. 14). State and national banks also have long exported credit card late charges in reliance upon *Marquette*,

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federally insured credit unions, are substantively identical to Section 521 of DIDA.

2. A number of state attorneys general also filed an *amicus curiae* brief in the First Circuit supporting Greenwood.

the uniform case law holding that "interest" in Section 85 encompasses a wide variety of fees and charges and opinion letters from the federal banking agencies advising the industry that Section 85 and Sections 521-523 permit the exportation of late charges.

Nor does the decision below generally interfere with state regulation of consumer lending practices. For example, it has no effect on state laws requiring specified disclosures, prohibiting discrimination, regulating collection practices and governing similar matters. This case does not involve, and the First Circuit did not decide, whether Section 521 extends to attorney's fees, prepayment penalties and like charges.

In short, the First Circuit's opinion merely reaffirms the legitimacy of a well-established banking practice and thus, contrary to the Commonwealth's claim, it will not have a "dramatic impact" on state consumer protection laws. There is no reason for this Court to grant a writ of certiorari in order to decide whether "interest" in Section 521 includes a late charge — an issue that has not created any conflict among the courts and federal banking agencies.

ARGUMENT

A. Courts Have Consistently Held That "Interest" As Used In Section 85 Is Not Restricted To Percentage-Based Periodic Interest Charges.

Congress was not writing on a clean slate when it enacted Section 521 in 1980. Rather, it incorporated into that statute, almost verbatim, the language of Section 85 of the National Bank Act, which was enacted more than a century earlier, in 1864. The preamble to Section 521 states that it was enacted "[i]n order to prevent discrimination against State-chartered insured depository institutions . . . ," and the legislative history of Sections 521-523 demonstrates that Congress intentionally incorporated Section 85's language into those statutes in order to establish a "level playing field" in which all federally insured depository institutions would obtain the same federal usury authority long exercised by national banks under Section 85. (Pet. App. A-29 — A-38). Given this legislative history, the preamble to Section 521 and the virtual identity of language between Section 85 and Section 521, the First Circuit held that those statutes should be construed *in*

pari materia. The Commonwealth does not challenge that determination.

This Court repeatedly has applied the cardinal rule of statutory construction that when Congress borrows the words of one statute to draft another "we can only assume it intended them to have the same meaning that courts had already given them." *Holmes v. Securities Investor Protection Corp.*, 112 S.Ct. 1311, 1318 (1992). *Accord Evans v. U.S.*, 112 S.Ct. 1881, 1885 n. 3 (1992) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Thus, the First Circuit held that the incorporation of Section 85's language into Section 521 reflected Congress' intention to adopt the judicial construction which the term "interest" had already received in the many decisions construing Section 85. (Pet. App. A-34 — A-36).

Courts have long recognized the need to construe "interest" in Section 85 to effectuate the "most favored lender" doctrine, which this Court articulated more than a century ago in *Tiffany*, *supra*, and reaffirmed in *Marquette*, *supra*, 439 U.S. at 314 and n. 26. This doctrine provides that Section 85 empowers a national bank (and Sections 521-523 now empower other federally insured depository institutions)[3] to make loans on credit terms as favorable as those allowed to any competing lender located in the same state; it is intended to safeguard federally insured depository institutions from the "hazard of unfriendly legislation by the states." *Tiffany*, *supra*, 85 U.S. at 413.[4] If "interest" under Section 85 and Section 521 were construed to encompass only percentage-based periodic interest charges, as urged by the

3. It has been held repeatedly that the most favored lender doctrine, which was originally applicable only to national banks, now extends to all federally insured depository institutions, since Congress incorporated the language of Section 85 into Sections 521-523 of DIDA in order to create parity among all federally insured depository institutions. *See, e.g., Gavey Properties, supra*, 845 F.2d at 521; *Hill v. Chemical Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992); *Vanderweyst v. First State Bank of Benson*, 425 N.W.2d 803, 805-07 (Minn. 1988), *cert. denied*, 488 U.S. 943 (1988); Interpretive Letter No. 92-47, Letter of Douglas H. Jones, FDIC Deputy General Counsel, (Current) Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992).

4. Relying on this Court's decisions in *Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549, 555 (1900), and *Citizens' Nat'l Bank v. Donnell*, 195 U.S. 369, 374 (1904),

Commonwealth, then a state would be free to enact a statute enabling certain lenders to impose late charges while denying that same right to federally insured depository institutions located in such state. This is precisely the type of "unfriendly legislation" that the most favored lender policy was intended to prevent.

The many cases construing Section 85 before the enactment of Section 521 in 1980 *uniformly* hold that "interest" under Section 85 is *not* restricted to percentage-based periodic interest charges, but also includes a wide array of other fees and charges.[5] *See, e.g., Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255, 261 (8th Cir. 1977) (credit card cash advance fee); *Northway Lanes v.*

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the Eighth Circuit declared several years before the enactment of Section 521 that "[t]he primary principle of construction of 12 U.S.C. §85 . . . is that the federal Act adopts the entire case law of the state interpreting the state's limitations on usury; *it does not merely incorporate the numerical rate adopted by the state.*" *First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) (emphasis added). *Accord Roper v. Consurve, Inc.*, 777 F. Supp. 508, 511 (S.D. Miss. 1990), *aff'd* 932 F.2d 965 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 181 (1991). Similarly, in 1936 the Office of the Comptroller of the Currency adopted an Interpretive Ruling, subsequently codified in 1972 at 12 C.F.R. §7.7310(a), providing that Section 85 incorporates not only the laws of the bank's home state which prescribe percentage-based periodic interest charges, but all of the state's usury laws which are "material to the determination of the interest rate." This Interpretive Ruling has been cited with approval by this Court and numerous courts of appeals. *See, e.g., Marquette, supra*, 439 U.S. at 314 n. 26; *Gavey Properties/762 v. First Financial Savings & Loan Association*, 845 F.2d 519, 521 (5th Cir. 1988); *Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255, 260 (8th Cir. 1977); *Fisher v. First Nat'l Bank of Chicago*, 538 F.2d 1284, 1288 n. 9 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 864 (6th Cir. 1972).

5. In *Marquette*, this Court recognized the economic nexus between percentage-based periodic interest charges and other fees and charges: "To compensate for the reduced interest [prescribed by Minnesota's limit on percentage-based periodic interest rates], Minnesota law permits banks to charge annual fees of up to $15 for the privilege of using a bank credit card. . . ." 439 U.S. at 302-03. Likewise, in creating interest rate "packages," some states compensate for a low ceiling on percentage-based periodic interest rates by allowing lenders to charge specified late fees. If the term "interest" in Sections 521-523 of DIDA and Section 85 were construed not to include late charges, federally insured depository institutions could be rendered "least favored lenders" in interstate transactions, since their home states could restrict them to low ceilings on percentage-based periodic interest rates and the states where their borrowers reside simultaneously could deny them the right to compensate for those low ceilings by imposing late charges permitted by their home states.

Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855, 863-64 (6th Cir. 1972) (closing costs);[6] *McAdoo v. Union Nat'l Bank*, 535 F.2d 1050, 1056 (8th Cir. 1976) (compensating balance requirement); *Panos v. Smith*, 116 F.2d 445 (6th Cir. 1940) (mortgage taxes and recording fees); *Schumacher v. Lawrence*, 108 F.2d 576, 577 (6th Cir. 1940) (same); *Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir. 1933), *cert. denied*, 290 U.S. 685 (1933) (bonus or commission); *Landau v. Chase Manhattan Bank*, 367 F. Supp. 992 (S.D.N.Y. 1973) (service and maintenance charges); *Gerber's Estate*, 337 Pa. 108, 9 A.2d 438 (1939) (bank charge in form of broker's commission); *First Nat'l Bank v. Phares*, 174 P. 519 (Okla. 1918) (transaction costs).[7]

In class actions triggered by the now-reversed district court decision in this case, courts specifically have held that credit card late charges constitute "interest" under Section 85 and Section 521. *Tikkanen v. Citibank (South Dakota), N.A.*, 801 F. Supp. 270, 1992 U.S. Dist. LEXIS 13836 (D. Minn. Sept. 10, 1992); *Nelson v. Citibank (South Dakota), N.A.*, 794 F. Supp. 312, 319 (D. Minn. 1992) (characterizing case law as "overwhelming"); *Hill v. Chemical Bank*, 799 F. Supp. 948 (D. Minn. 1992);[8] *Sherman v. Citibank (South Dakota), N.A.*, Superior Court of New Jersey Law Division — Camden County, Docket No. L-01834-92 (Nov. 25, 1992).

In light of the uniform and well-established body of law construing "interest" in Section 85 to encompass an array of fees other than percentage-based periodic interest charges, the Commonwealth concedes, as it must, that courts construing Section 85

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6. The Commonwealth attempts to dismiss *Northway Lanes* by contending (Pet. 28, n. 19) that the court did not decide that closing costs are "interest." However, in addressing the legality of the national bank's imposition of closing costs on the borrower (which were permitted to state savings and loan associations but not banks in the state where the national bank was located), the court held that "[t]he legislative history of Section 85 . . . requires the conclusion that national banks may charge as much *interest* as savings and loan associations are allowed to charge on equivalent transactions by Michigan law." 464 F.2d at 862 (emphasis added).

7. *See, also, American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); *Kenty v. Bank One, Columbus, N.A.*, 1992 WL 170605 (S.D. Ohio April 23, 1992) (excessive and unauthorized insurance premiums).

8. *Nelson* and *Hill* were decided prior to the First Circuit's ruling below.

have "often broadly interpreted 'interest' to cover a wide variety of charges" and "[t]here is no question that in usury cases courts *must include as interest* some fees and charges associated with loans." (Pet. 27, 29) (emphasis added). (*See also* Pet. at 43 (acknowledging that certain "incidental loan charges" may "fairly be viewed as 'interest'")). These concessions contradict the Commonwealth's assertion (Pet. 30) that the supposed "plain meaning" of "interest" in Sections 521-523 and Section 85 excludes late charges.[9]

The Commonwealth argues (Pet. 26-30) that although some loan-related fees and charges "must" be considered "interest" for usury purposes under Sections 521-523 and Section 85, they somehow lose their status as "interest" when considered in the preemption context under those *same statutes*.[10] While the Commonwealth's proposed distinction between usury cases and preemption cases is somewhat unclear,[11] the Commonwealth seems

9. Delaware and many other states deem late charges to be "interest"; other states take a contrary view. *See* Annotation, 63 A.L.R. 3d 50 (1975). The very existence of these divergent views refutes the Commonwealth's claim that the supposed "plain meaning" of "interest" does not embrace late charges. *Cf. National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) ("The existence of alternative dictionary definitions of the word ... itself indicates that the statute is open to interpretation. Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."). When Section 521 was enacted, *Black's Law Dictionary* (5th ed. 1979) defined "interest" as "the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Moreover, about the time Section 85 was enacted, this Court defined "interest" as the "compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention. . . ." *Brown v. Hiatt*, 82 U.S. (15 Wall.) 177, 185 (1873). Late charges clearly fall within these definitions.

10. The Commonwealth fails to acknowledge that the "usury cases" it dismisses as "a completely distinct line of cases" arise under *Section 85*, not state usury statutes. (*See* cases cited at Pet. 27-29, n. 19).

11. The Commonwealth characterizes *Fisher v. First Nat'l Bank of Omaha*, *supra*, as a usury case and not a preemption case. In *Fisher*, a national bank located in Nebraska charged its Missouri credit cardholders a flat cash transaction fee forbidden by Missouri law but authorized under Nebraska law for small loan companies. The Commonwealth states that the *Nebraska* "small loan interest rate was high enough to make the [cash transaction] fee irrelevant." (Pet. at 28, n. 19). However, Section 85's incorporation of the Nebraska small loan statute shows that the fee was "interest." The bank's imposition of this fee on Missouri cardholders involved both *exportation* of Nebraska law and *preemption* of Missouri law.

to argue that the word "interest" in Section 85 and Section 521 has one meaning in one situation and a different meaning when construed in another context. This protean construction is not accompanied by citation to case law or legislative history, and indeed there is nothing in the history of Sections 521-523 or Section 85 suggesting that Congress intended the word "interest" in those statutes to be construed more narrowly in the preemption context than in the usury context. If Greenwood's late charge "must" be treated as "interest" under Section 521 for usury purposes, it must likewise be considered "interest" under Section 521 for preemption purposes. *See* Pet. App. at A-50 — A-51; *Tikkanen, supra,* 1992 U.S. Dist. LEXIS 13836 at *18; *Nelson, supra,* 794 F. Supp. at 320.

The Commonwealth has not cited *any* decision rendered by this Court, another court of appeals or a state court of last resort (or any other court) holding that "interest" in Sections 521-523 of DIDA or Section 85 is limited to percentage-based periodic interest charges. Thus, there is no conflict between the First Circuit's construction of "interest" in Section 521 and that adopted by any other court.[12] Nonetheless, as one of its reasons for granting certiorari, the Commonwealth has attempted to create the appearance of a conflict between the First Circuit's decision and the decisions in three completely inapposite cases: *Nat'l State Bank v. Long,* 630 F.2d 981 (3d Cir. 1980); *North Dakota v. Merchants Nat'l Bank and Trust Co.,* 634 F.2d 368 (8th Cir. 1980) (*en banc*); and *Perdue v. Crocker Nat'l Bank,* 38 Cal.3d 913

12. The First Circuit's construction of the meaning of "interest" accords not only with the views of all other courts but also with those held by the federal banking agencies. The FDIC, which is charged with the responsibility of administering the Federal Deposit Insurance Act (including the provision at issue), filed an *amicus curiae* brief in the First Circuit urging it to hold that Greenwood's late charge constituted "interest" under Section 521, and a recent FDIC staff opinion letter reiterates that position. Interpretive Letter No. 92-47, Letter of Douglas H. Jones, FDIC Deputy General Counsel, (Current) Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992). Also, the OCC and the Federal Home Loan Bank Board have opined that late charges constitute "interest" under Section 85 and Section 522 of DIDA. (Pet. App. A-52 — A-53). The First Circuit noted that its statutory construction found support in the banking agencies' views, but stated that it did not base its decision on deference to these agency views because "we would reach the same result independent of any reliance on them." (Pet. App. A-52 — A-53 and n. 11).

(1985), *appeal dismissed*, 475 U.S. 1001 (1986). (Pet. 37-39). None of these cases involves Section 85 or Sections 521-523 of DIDA, much less considers the meaning of "interest" as used in those statutes.[13] Thus, the supposed "conflict" between these decisions and the decision below is chimerical.[14]

The Commonwealth also contends that the decision below conflicts with cases upholding dual state and federal regulation of national banks. (Pet. 35-37). However, none of these cases involves the scope of preemption under Section 85 or Sections 521-523 of DIDA. Moreover, the Commonwealth's argument ignores the express preemption provision contained in Section 521, added by Congress two years after *Marquette* to ensure that federally insured state banks, savings and loan associations and credit unions would obtain the same interstate exportation powers that *Marquette* held to be possessed by national banks under Section 85. (Pet. App. A-36 — A-37).

In *Marquette*, this Court unanimously held that Section 85 empowers a national bank to export the interest allowed in the state where it is located to any state where a credit card customer resides, regardless of whether the exported interest exceeds the usury ceiling of the cardholder's state. This Court acknowledged that such exportation power might "significantly impair the ability of States to enact effective usury laws," but it nonetheless held

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13. *Long* involved a state prohibition against redlining, *Merchants Nat'l* involved national bank name changes pursuant to Section 30 of the National Bank Act, and *Perdue* involved the general deposit-taking powers of national banks under Section 24 of the National Bank Act. *Long* and *Merchants Nat'l* are so wide of the mark that they were neither mentioned in the district court's opinion nor cited in the Commonwealth's brief in the First Circuit. The district court acknowledged that *Perdue* was "not squarely on point here. . . . " (Pet. App. C-50).

14. The Commonwealth also incorrectly suggests that the First Circuit's decision is inconsistent with *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). (Pet. 40). That case holds that federal law governs the meaning of "branch" for purposes of the McFadden Act, since Congress defined that term in the Act. 12 U.S.C. §36(f). By contrast, Congress did not define "interest" in Section 85 or Section 521, and those statutes explicitly incorporate the laws of the state where the bank is located. In any event, the First Circuit held that late charges constitute "interest" under both federal common law *and* Delaware law, and therefore it did not deem it necessary to resolve whether federal law or state law governed the definitional issue. (Pet. App. A-43 — A-44).

that "state usury laws must, of course, give way to the federal statute." *Id.* at 318-19 n. 31. Requiring banks to comport with the varying usury laws of each state where their credit cardholders reside would "throw into confusion the complex system of modern interstate banking." *Id.* at 312. Forcing credit card issuers to vary their late charge provisions to comply with disparate state laws would engender the very confusion *Marquette* sought to avoid.

Finally, the Commonwealth's contention (Pet. 30-35) that the First Circuit's preemption finding is "inconsistent" with the decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992) is baseless. The First Circuit's opinion is replete with citations to *Cipollone*, and its preemption analysis was entirely faithful to the preemption principles outlined by this Court in that case.[15] The First Circuit correctly held that the express preemption provision of Section 521 and that statute's legislative history showed that Congress' "intent to displace state law is clear." (Pet. App. A-39).[16]

The Commonwealth's argument concerning the incompatibility of the decision below and *Cipollone* rests on a misreading of a

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15. Similarly, the Commonwealth's reliance (Pet. 33-35) upon *Cable Television Ass'n v. Finneran*, 954 F.2d 91 (2d Cir. 1992) is misplaced. There, the court held that the Cable Act's preemption of state laws regulating rates for the "provision" of cable services did not extend to downgrade charges imposed for *removing* such services. The court noted that the Cable Act allows "marketplace forces, rather than Government regulation" to determine rates for the "provision" of cable services, and downgrade charges are not covered by the Act's preemption provision because they create a disincentive to switch cable providers and thus "insulate cable companies from market forces." *Id.* at 100. In the instant case, of course, the Commonwealth is arguing *against* the Congressional determination in DIDA to allow marketplace forces to govern the pricing of credit by banks. As was the case with the Airline Deregulation Act of 1978, considered by this Court in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992), it would serve no purpose under Section 521 to "undo federal deregulation" and hamper the functioning of a free and open market for credit services by subjecting federally insured state banks to a myriad of state usury laws rather than the single usury law (applicable to the "most favored lender" in the bank's home state) incorporated by Section 521.

16. *See also* Pet. App. A-54 (Congress' "preemptory mindset" was "clear and unequivocal" and Section 521 expressly preempts state law "with undeniable clarity."); Pet. App. A-19 ("Congress' intent to effect preemption remains clear and manifest. . . . ").

comment by the First Circuit as to the "inconclusive" nature of the text and legislative history of Section 521. This comment pertained not to Congress' preemptory intent, but related solely to the meaning of "interest." Moreover, it only addresses Section 521's text and legislative history and makes no reference to the case law under Section 85. (Pet. App. A-41). To construe the meaning of "interest," the First Circuit analyzed the many pre-DIDA precedents construing the identical language in Section 85. (*See* pp. 6-7, *supra*). That time-honored approach to statutory construction does not conflict in any respect with the teachings of *Cipollone* or any of this Court's other preemption decisions. *See Morales v. Trans World Airlines,* 112 S.Ct. 2031, 2037 (1992) (construing preemptive language in Airline Deregulation Act in same manner as identical language in ERISA); *Ingersoll-Rand Co. v. McLendon,* 498 U.S. 133, 111 S.Ct. 478, 485-486 (1990) (construing preemptive language in §502(a) of ERISA *in pari materia* with §301 of Labor Management Relations Act).

B. The First Circuit's Decision Does Not Have The Practical Significance Claimed By The Commonwealth.

As discussed above, the First Circuit's construction of "interest" in Section 521 simply reaffirms already well-settled law, and therefore its decision does not carry great legal significance. Likewise, that decision has far less practical import than the Commonwealth would have this Court believe.

The Commonwealth has substantially overstated the dollar amount of late charges affected by the decision below.[17] Moreover, although the Commonwealth has suggested that the decision

17. Several of the states which the Commonwealth claims prohibit all late charges on all credit card accounts in fact permit late charges, subject to certain limitations. For example, the Commonwealth contends that N.J. Stat. Ann. §17:16C-50 prohibits late charges but ignores the fact that credit card issuers in New Jersey may assess late charges under a different statute. *See* N.J. Stat. Ann. §17:9A-59.7.A. Moreover, nine of the states which the Commonwealth incorrectly claims limit late charges would permit any late charge by statute. *See* Ariz. Rev. Stat. Ann. §44-1205.C.4; Conn. Gen. Stat. Ann. §42-133c; Fla. Stat. Ann. §658.50(1); Ga. Code Ann. §7-5-4(b); Haw. Rev. Stat. §478-4(b); Md. Com. Law Code Ann. §12-910(a)(2)(i); Nev. Rev. Stat. §97.245.1; S.D. Codified Laws Ann. §51A-12-13(7); and Va. Stat. Ann. §6.1-330.78.A.1. The Commonwealth's mischaracterization of the laws of these states largely stems from its failure to recognize that each of these states has alternative usury provisions to those the Commonwealth has cited in its Petition. Moreover, the Commonwealth

will necessarily be extended to preempt state limitations on attorney's fees, prepayment charges and like fees and charges, the decision simply held that a late charge is "interest" within the preemptive scope of Section 521. This decision says nothing about consumer protection laws requiring specified disclosures, prohibiting discrimination, regulating collection practices and governing similar matters.[18]

The Commonwealth ignores the importance of *Marquette*, the true watershed decision relating to exportation of interest charges. For many years, banks have been exporting percentage-based periodic interest charges, a practice the Commonwealth concedes is lawful under Sections 85 and 521 and *Marquette*. Even if this Court accepted at face value the Commonwealth's figure for late charge revenues affected by the First Circuit decision, there is no question that exported late charge revenues are dwarfed by the percentage-based periodic interest charges banks export.[19] Moreover, the decision below will have little effect on

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has ignored state choice of law rules that could result in application of the substantive law of a bank's home state rather than a borrower's state in many cases. Also, the Commonwealth relies on a magazine article to claim that $858 million in late charges was collected by credit card issuers in 1991 (Pet. 16-17) but fails to note how much of this amount was collected in conformity with the laws of the states where the cardholders reside. Indeed, many of the largest states, including New York, Illinois, Florida and Ohio, would permit the late charge at issue as a matter of state law and California does not prohibit late charges.

18. The Commonwealth's assertion (Pet. 11) that the decision below will spur lenders to file declaratory judgment actions against state law enforcement officers in order to avoid compliance with state consumer protection laws is without foundation. The Commonwealth has not cited *any* such actions brought to date, nor is Greenwood aware of any. Also, the Commonwealth's assertion that statutes prohibiting late charges are necessary to protect the "average consumer" (Pet. 18) is contradicted by its acknowledgment in the First Circuit that defaults triggering late charges are "relatively infrequent." (Comm. Br. at 69 n. 84). The only consumers who would benefit from invalidating Greenwood's late charge are those who default on their obligation to make timely payment of their minimum monthly installment, and their gain necessarily would come at the expense of the vast majority of cardmembers who make their payments on time. *See* Dr. William C. Dunkelberg, "Litigation Concerning Late Charges is Major Threat to Credit Card Business," *Banking Policy Report*, April 6, 1992 (available on LEXIS).

19. According to *The Nilson Report* (November 1991), an industry newsletter, revenues relating to late payments and other defaults constituted less than 5% of revenues from percentage-based periodic interest charges in 1990 and 1991.

the exportation of late charges since banks also have been exporting such charges for many years without challenge. They have done so in reliance upon *Marquette*, the unbroken line of cases holding that "interest" in Section 85 extends to a wide variety of charges and not just percentage-based periodic interest charges and the post-*Marquette* interpretive opinion letters by the federal banking agencies endorsing the exportation of late charges (Pet. App. A-52 — A-53). Thus, the First Circuit's decision most certainly does not herald a significant alteration of "the state/federal balance in banking regulation," as asserted by the Commonwealth. (Pet. 19).[20]

Congress has amended Section 521 twice in the past five years. (P.L. 100-86, §101(g) (2), 101 Stat. 552, 563 (1987); P.L. 101-73, §201(a) (1), 103 Stat. 183, 187 (1989)). It must be presumed that, during this time, Congress was aware of and approved the exportation of late charges by credit card issuers and the judicial and administrative interpretations of "interest" in Section 85 and Sections 521-523. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). Had Congress intended a more restrictive construction of the word "interest" in those statutes, it could have amended them to narrow their preemptive scope, but it has not done so.

In fact, when Congress re-codified Section 522 of DIDA in 1989, it plainly stated that the preemptive scope of Sections 521-523 of DIDA is *not* confined to percentage-based periodic interest charges, but includes other fees and charges as well:

> [The rate authorized by Section 522 of DIDA] may be employed notwithstanding any State constitution or statute concerning *loan related charges*, which is thus preempted. *The effect of this section is to preserve the current preemption of state usury laws*. H.R. Rep. No. 54 at 343 (101st Cong., 1st Sess., pt. 1) (1989) (emphasis added).

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20. The various class actions against credit card issuers that resulted from the erroneous district court decision in this case do not militate in favor of granting certiorari, as the Commonwealth contends. (Pet. 18 and n. 13). None of those cases has progressed to the appellate level. There is no conflict for this Court to resolve since all of the cases agree that credit card late charges constitute "interest". (*See* pp. 6-7, *supra*). *Cf. Cipollone v. Liggett Group, Inc.*, 479 U.S. 1043

As this Court declared in *Red Lion Broadcasting, supra,* "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." 395 U.S. at 380-81. *Accord Heckler v. Turner,* 470 U.S. 184, 209-11 (1985); *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 846 (1986); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-75 (1974).

The Commonwealth's policy arguments concerning the desirability of according primacy to state usury laws should be directed to Congress, not this Court. As this Court held unanimously in *Marquette,* "the protection of state usury laws is an issue of legislative policy, and any plea to alter §85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court." 439 U.S. at 319.

C. The Commonwealth's Reliance On Other Authority Is Misplaced.

The Commonwealth makes several references (Pet. 24, 46) to the legislative history of Section 501 of DIDA. However, Section 501 is plainly inapposite. As the First Circuit concluded (Pet. App. A-49 — A-50 at n. 10), the legislative history of Section 501 is irrelevant because: (a) Section 521 incorporates the language long used in Section 85, while Section 501 contains completely dissimilar language; (b) Section 501 applies to first-lien residential mortgage loans by a wide variety of lenders, while Section 521 applies to any loan by a federally insured state bank; (c) Sections 501 and 521 originated in different bills that had vastly different purposes; (d) Sections 501 and 521 have materially different preemption provisions; (e) Section 501 amended the National Housing Act, while Section 521 amended the Federal Deposit Insurance Act; (f) DIDA was a hodgepodge of diverse and unrelated provisions affecting a wide variety of financial institutions, making it inappropriate to apply the legislative history of one provision to construe the meaning of a different provision; and (g) there is no evidence that Congress intended "interest" to have a single meaning throughout all of Title V of DIDA (Sections

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(1987) and 112 S.Ct. 2608, 2613 and n. 3 (1992) (certiorari initially denied prior to conflict, but later granted when conflict arose).

501-529).[21] Section 501 was enacted more than 100 years after the language at issue in this case was first adopted by Congress in the National Bank Act of 1864, and thus it cannot possibly shed light on the intended meaning of that language.[22]

The First Circuit's decision to base its construction of "interest" in Section 521 on the many pre-DIDA judicial precedents construing the identical language in Section 85, rather than the inapposite legislative history of Section 501, is fully consistent with this Court's precedents. *See, e.g., Barnhill v. Johnson*, 112 S.Ct. 1386, 1391 (1992) (in holding that a date-of-honor rule should apply to check payments to determine when a "transfer" occurs under §547(b) of the Bankruptcy Code, this Court deemed irrelevant the legislative history indicating that a date-of-delivery rule

21. The only term Congress defined for the entirety of Title V of DIDA was "State," which was defined in Section 527 "[f]or purposes of this *title*." 94 Stat. 168 (emphasis added). Section 501(e) of DIDA defined various terms (*other* than "interest"), but explicitly stated that those definitions applied only "[f]or the purpose of this *section*." 94 Stat. 163 (emphasis added). That Congress did not intend the term "interest" as used in Section 501 to have the same meaning throughout Title V of DIDA is further underscored by the fact that several months after DIDA was enacted, Congress amended Section 511 (preempting state usury limits on specified business and agricultural loans) of DIDA by providing that "the term 'interest' includes *any compensation, however denominated*, for a loan." (P.L. 96-399, §324(b)(2), 94 Stat. 1648) (emphasis added). The amendment's sponsor, Senator Proxmire, emphasized that it was simply "a technical clarifying amendment making no substantive changes in the usury preemption provisions." 126 Cong. Rec. S17,738 (1980).

22. The Federal Home Loan Bank Board (now the Office of Thrift Supervision), the agency with interpretive authority under Sections 501 and 522 of DIDA, has recognized that late charges should be treated differently for purposes of Sections 501 and 522. *Compare* 12 C.F.R. §590.3(c) with Letter of Harry W. Quillian, Acting General Counsel of the Federal Home Loan Bank Board (June 27, 1986).

should determine when a "transfer" occurs under §547(c) of the Code); *Dewsnup v. Timm*, 112 S.Ct. 773, 778-79 (1992) (holding that "allowed secured claim" should be given a different meaning in §506(d) of the Bankruptcy Code than in §506(a), since Congress had not been writing "on a clean slate" in enacting §506(d) and there was no evidence it intended to alter the pre-Code practice).[23]

23. The Commonwealth's citation (Pet. 44-46) to the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"), sheds no light on whether late charges are "interest" under Section 521. TILA is a disclosure statute that was not intended to make substantive changes in laws relating to the extension or maintenance of credit. *See* 15 U.S.C. §1610(b); 12 C.F.R. §226.1(b). Also, Sections 521-523 and Section 85 do not employ the TILA terms "annual percentage rate" or "finance charge," and the legislative history of Sections 521-523 makes no reference to TILA. Thus, no court has relied upon TILA to construe the meaning of "interest" in Sections 521-523 or Section 85.

Similarly, the Commonwealth's citation (Pet. 47-48) to a number of general treatises on contracts and damages to support its argument (Pet. 43) that charges "contingent on lateness of payment, not on the making of the loan itself," are not "interest" conflicts with the authority, cited at p. 7, *supra*, holding that late charges are "interest." The argument was expressly rejected by the court in *Tikkanen, supra*, 1992 U.S. Dist. LEXIS 13836 at *19-*23.

CONCLUSION

The Commonwealth has been unable to identify a conflict in the courts implicated by the decision below. It has overstated the practical significance of the decision, which flows inexorably from *Tiffany, Marquette* and cases holding that a wide variety of fees and charges constitute "interest" under Section 85. Finally, it has relied on authority that is irrelevant in determining the meaning of "interest" under Section 521. For all of the foregoing reasons, its Petition for a Writ of Certiorari should be denied.

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In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.,

Petitioners,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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INTEREST OF AMICUS CURIAE

Bankcard Holders of America ["Bankcard Holders"] submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by the Commonwealth of Massachusetts, *et al.*

This Court should grant certiorari to consider whether Congress intended the term "interest" in Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ["DIDA"][1] to be construed broadly so as to preempt state consumer protection statutes regulating non-interest charges on credit cards. The opinion below found DIDA preemption, even though the legislative history and context of the statute was "inconclusive." (A-41). The First Circuit's opinion wreaks havoc with state consumer protection statutes and adversely affects millions of consumers.

Bankcard Holders is a national, non-profit organization dedicated to consumer credit education and advocacy. Founded in 1980, Bankcard Holders has a current membership of more than 50,000 individual consumers. Bankcard Holders receives no financial support from the banking or credit industry. Instead, it relies on membership dues, charitable donations and publication sales. In addition to its bi-monthly newsletter reporting on credit industry practices and credit card opportunities, the organization has published and distributed educational pamphlets for credit card consumers such as "How to Choose a Credit Card," and "Credit Cards: What You Don't Know Can Cost You!"

The lower court's opinion presents issues of profound and far-reaching importance to consumer credit card holders. Application of the First Circuit's preemption analysis will permit the legislatures in scarcely populated states to trump the consumer protection legislation of densely populated states under the rubric of federal preemption.

SUMMARY OF THE ARGUMENT

The Commonwealth of Massachusetts, along with eighteen states and the District of Columbia (A-3), requested the First

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[1] Pub. L. No. 96-221, 94 Stat. 132 (1980).

Circuit to affirm the well-reasoned opinion of District Judge William G. Young (C-1-126) which had held that states may enact consumer protection laws to protect their residents from delinquency charges, including late charges, imposed by a state-chartered bank (Greenwood Trust Company). Other non-state *amici* joined in that request. (A-2, 3).

Both the District Court, as evidenced by its 12 U.S.C. Section 1292(b) certification (D-1-6), and the First Circuit recognized the "pivotal importance" of the preemption issues presented. The First Circuit stated:

> In light of the pivotal importance and broad commercial consequence of the questions presented, we accepted the certification. (As an aside, we remark that our belief as to the importance of the questions presented has been validated to some degree by the outpouring of amicus briefs, some favoring appellant's position and some opposing it). (A-8)

The question that divided the Parties and *amici* below was described by the First Circuit as whether "a state law banning the imposition of late charges is a law regulating interest within the purview of Section 521" of DIDA. (A-20). That is, "can a federally insured bank, chartered in Delaware, charge its Massachusetts credit-card customers a late fee on delinquent accounts, notwithstanding a Massachusetts statute explicitly prohibiting the practice?" (A-4).

This Court should grant certiorari and reverse the judgment below because, among other things, the decision:

1. Conflicts in principle with the decisions of this Court in *National Bank v. Johnson*, 104 U.S. 271 (1881); *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901); and *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919);
2. Expands the meaning of the term "interest" in Section 521 of DIDA, and thus the scope of the statute's preemption, so as to include "non-interest" delinquency charges like late fees in a manner which conflicts with Congress' understanding in DIDA and the common law meaning of the term "interest;" and
3. Conflicts with the "legislative history" and the "historical context" of Section 85 of the National Bank Act (which this Court in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*,

439 U.S. 299, 314 (1978), suggested must be considered), even though the court below determined that Section 521 of DIDA was modeled after Section 85 of the National Bank Act.

The First Circuit's opinion is being widely cited in state and federal courts to disembowel many different state consumer protection statutes and state common laws limiting contractual penalty charges like late fees. It is vitally important to states and consumers across the nation that this Court review and reverse the decision below.

ARGUMENT

I. REVIEW SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS IN PRINCIPLE WITH THE MANY DECISIONS OF THIS COURT REQUIRING PREEMPTION TO BE DETERMINED BY A UNIFORM FEDERAL STANDARD.

A. It Was Improper To Consider What Delaware Defines As Interest In Determining The Meaning Of Interest Under Section 521.

The opinion below looked to both federal and Delaware law for the meaning of "interest" in Section 521. Reasoning that the result would be no different under federal or state law, the First Circuit said it was unnecessary to choose one over the other. (A-43-44). That assertion conflicts in principle with this Court's prior decisions.

In *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901), and *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919), this Court clearly found that federal law, rather than state law, should provide the context and the scope of the term "usury" in Section 85 of the National Bank Act. In *Haseltine*, this Court stated that "the definition of usury and the penalties affixed thereto must be determined by the National Banking Act, and not by the law of the State." 183 U.S. at 134.

Subsequently, in *Evans*, this Court recognized that both "interest" and "usury" were determined by reference to federal law, stating:

> The maximum interest rate allowed by the Georgia statute is eight per centum. That marks the limit which a

> national bank there located may charge upon discounts; but its right to retain so much arises from federal law. The latter *also* completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate.

251 U.S. at 114 (emphasis added).[2]

This Court has also recognized the danger in referring to state law when the question is one of federal law. In *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969), the Court considered whether federal or state law defined the term "branch" in the National Bank Act. This Court recognized that to permit state legislatures to define the federal term "branch" would "make them the sole judges of their own powers," and that Congress "did not intend such an improbable result":

> We reject the contention . . . that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36(f). . . . [T]o allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch."

396 U.S. at 133-34.

The First Circuit's opinion permits just such an "improbable result" without any finding that Congress intended it. The First Circuit analyzed Delaware's statute and found that it "explicitly incorporates late charges into the definition of interest and allows lenders to assess such fees against credit-card customers." (A-46-47). The First Circuit rationalized this analysis, stating: "Thus, were we to look to Delaware law for help in fathoming the meaning of 'interest' and 'interest rates,' late charges would be included." (A-47).

This Court should review and reject the First Circuit's method of analyzing the preemption question presented. How the anti-consumer legislature in Delaware defined the term "interest" is irrelevant to what Congress intended when it used the term to define the scope of federal preemption in Section 521.

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[2] *See also Partain v. First Nat'l Bank*, 467 F.2d 167, 171 (5th Cir. 1972).

B. Congressional Use Of The Term "Interest" And "Discount" In Other Statutes Further Supports Massachusetts' Legal Position In This Case.

In construing the statutory term "interest" in other contexts, this Court has recognized that it has a long-standing, well-established meaning. See *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 561 (1931) (Internal Revenue Code), where this Court stated:

> [T]hat in the common understanding "interest" means what is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon, and that the words of the statute permit the deduction of that sum, and do not refer to some esoteric concept derived from subtle and theoretic analysis.

Late fees are *not* paid in "bond and coupon."

Shortly after *Old Colony*, this Court, in *Deputy v. DuPont*, 308 U.S. 488 (1939), recognized an ordinary use of the term "interest":

> In the business world "interest on indebtedness" means *compensation for the use or forbearance on money.* In absence of clear evidence to the contrary, we assume that Congress has used these words in that sense.

Id. at 498 (emphasis added). Late fees are not "compensation for the use of money," but charges for a default within the control of the *borrower*.[3]

There is still other evidence of the Congressional use of the term "interest" in the National Bank Act, which served as a model for DIDA. (A-32). Section 85 of the National Bank Act provides, in relevant part:

> **§ 85. Rate of interest on loans, discounts and purchases**
>
> Any association may take, receive, reserve, and charge on any *loan or discount* made, or upon any notes, bills of exchange, or other evidence of debt,

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[3] If a late fee was "interest," then the borrower would cause the lender to commit usury by a default and then could sue the lender for usury. This makes no sense, even from a lender's viewpoint.

> *interest* at the rate allowed by the laws of the State, Territory, or District where the bank is located. . . .

12 U.S.C. § 85 (emphasis added).[4]

Therefore, "interest," whether with respect to a "loan" or a "discount," is the same and must be interpreted in an identical manner. In *National Bank v. Johnson*, 104 U.S. 271 (1881), this Court held that the terms "loans" and "discounts" are "synonyms," and "both are expressly made subject to the same rate of interest." *Id.* at 277. The Court in *Johnson* also noted the limitations of its decision in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), which the court below overlooked:

> All that was said in that case [*Tiffany*] related to loans and to the rate of interest that was allowed thereon; and it was held that where by the laws of a State in which a national bank was located one-rate of interest was lawful for natural persons and a different one to State banks, the national bank was authorized to charge on its loans the higher of the two. *The sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there be any difference between them.*

Johnson, 104 U.S. at 277 (emphasis added).

The term "discount rate," which is used in the same sentence as the term "interest" in Sections 85 and 521, is understood today to be the rate the Federal Reserve charges member banks for loans at the discount window.[5] In the 1800's, as today, the discount rate[6] was always expressed as a rate *per period of time* for loans or

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[4] The language in § 521, 12 U.S.C. § 1831(d), is virtually identical to Section 85, 12 U.S.C. § 85.

[5] *See, e.g.*, L. Ritter & W. Silber, *Principles of Money, Banking, and Financial Markets*, 169-183 (3d ed. 1983) ("*Principles of Money*"); T. Simpson, *Money, Banking and Economic Analysis*, 169-192 (2d ed. 1981) ("*Money, Banking*").

[6] The term "discount rate" has roots extending back to at least the 1700's, when it was common practice for the Bank of England to extend loans to the Crown by way of discounting notes or bonds issued by the British government. *See Principles of Money* at 170 & n.2; *Money, Banking* at 174.

discounts on collateral paper. *Cf., e.g., Evans v. Nat'l Bank*, 251 U.S. at 114; Breckenridge, *Discount Rates in the United States*, 13 Pol. Sci. Q. 119, 120-122 (Table) (1898) ("*Discount Rates*"), *cited with approval in Marquette*, 439 U.S. at 317. Although discount interest is collected at the outset of a loan while loan interest is typically paid periodically after a loan has been made, the elements of the terms "discount rate" and "interest rate" are identical.[7] Thus, interest on a "loan" or on a "discount" must be calculated the same way. *Cf., Johnson*, 104 U.S. at 277.

With reference to discounts, a precise rate has been regularly published in financial periodicals and, for at least the last twenty years, in the Federal Register and in various Federal Reserve Board publications. *See, e.g.*, 12 C.F.R. §§ 201.4-201.52 (1991); 45 Fed. Reg. 54,010 (1980); *Federal Reserve Bulletin* (1970-1992). The published "discount rate" has *never* included surcharges, penalty charges, or any other charge other than the base rate. *Cf., e.g., Discount Rates*, 13 Pol. Sci. Q. at 120-122 (describing *Bradstreet's* reports). In addition, it has always been a fundamental assumption of domestic economic and monetary policy that the "discount rate" refers *only* to the published, base rate, and not to any other type of charge.[8]

The parallel usage of the terms "interest" and "discount" in the National Bank Act and in DIDA demonstrates that Congress intended "interest rate" in DIDA to include the same elements as "discount rate" and to be construed as the two terms have been historically used at common law.[9] Because discount interest does not include late fees, Congress could not have intended loan interest to include such charges in DIDA.

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[7] *Cf., Principles of Money* at 174 n.5.

[8] *See generally Principles of Money* at 170-195; *Money, Banking* at 214-15.

[9] *Cf. Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (an important statutory term should be construed consistent with the other terms with which it is associated).

C. The First Circuit Failed To Employ The Appropriate Method For Analyzing A Federal Preemption Provision.

In determining what Congress intended when it used the term "interest," the First Circuit concluded that the legislative history and historical context of DIDA were "inconclusive." (A-41). Under this Court's recent preemption opinion in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), when the First Circuit found the statute's text and legislative history "inconclusive" (A-41), it should have construed Section 521 narrowly and found no preemption.

It did exactly the opposite. Instead of reading Section 521 narrowly, the First Circuit wandered off on its own path of statutory interpretation to determine if late fees could be considered "interest." It began by determining that the purpose of DIDA was "to strike a competitive balance between state and national lending institutions by giving them equal power in charging *interest rates*." (A-51) (emphasis added). Next, it recognized that if it read the term "interest rates" expansively so as to include "fees in connection with the extension and maintenance of credit," that reading would ensure "parity" between state and national lending institutions. (A-53-54).[10] Finally, it found "no reason to define either the term 'interest' or the term 'interest rates,' for purposes of section 521, in a manner that excludes late fees." (A-53).

The problem with the lower court's analysis is that it disregards the meaning of "interest" at common law, and as used by Congress when it enacted both the National Bank Act and DIDA. One result of this misdirected analysis is that the scope of DIDA's federal preemption of state consumer laws may be determined by individual, anti-consumer states. The "improbable result" criticized by this Court in *First Nat'l Bank v. Dickinson* has happened here. One state (Delaware) has preempted the state consumer laws of

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[10] In fact, national banks, under Section 85 of the National Bank Act, cannot charge late fees as "interest" for the reasons stated in this brief (*i.e.*, the common law definition of interest did not include special default or penalty charges, which is also shown by the "legislative history" and the "historical context" of the National Bank Act). The First Circuit erroneously assumed that Section 85 "interest" included within its scope "late fees."

another state (Massachusetts) by redefining the term "interest" so as to include delinquency charges (late fees) and penalties which were not permitted at common law and were not intended by Congress to constitute "interest."

II. REVIEW SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT'S OPINION CONFLICTS WITH WHAT CONGRESS INTENDED THE TERM "INTEREST" TO MEAN.

In the opinion below, the First Circuit, without analysis, erroneously asserted that "federal case law has long suggested that, in ordinary usage, interest may encompass late fees. . . . " (A-24).

In fact, the exact opposite is true. Late charges *not measured by time* were historically prohibited under both federal and state laws and were considered not to constitute "interest." Historically, amounts owed a lender, *measured by time*, were sometimes called "damages." However, "damages" that were *not measured over time*, but instead represented a sum certain, were considered to be liquidated damages or penalties, and were prohibited at common law.[11]

In 1864, Congress enacted Section 85 of the National Bank Act, upon which Section 521 of DIDA was modeled. (A-32-35). The First Circuit should have, but did not, consider the common law meaning of the term "interest" in 1864 when Congress included the term in the National Bank Act.[12]

In interpreting a federal statute, this Court has followed "the axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975)

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[11] This Court considered the common law highly relevant in ascertaining congressional intent and the preemptive scope of Section 85 in *Marquette*. *See* 439 U.S. at 317 (citing common law cases involving interstate loans of which Congress would be presumed to have knowledge).

[12] Significantly, it is this definition that Congress is presumed to have intended in 1864 when it used the term. *See Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1853), ("The popular or perceived import of words furnishes the general rule for the interpretation of public laws.").

(defining "child"); *see also Perrin v. United States*, 444 U.S. 37, 42-3 (1979) ("we look to the ordinary meaning" and "consider first the development and evolution of the common law definition [of bribery]."). Application of this principle to the term "interest" in the National Bank Act and in DIDA would require reversal of the First Circuit's decision.

A. The Common Law Meaning of The Term "Interest"

There is no indication that Congress intended "interest" in Section 521 to be different from the common law meaning of the term. The First Circuit should have applied the settled rule of statutory construction set forth in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989): "Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.* at 739-40 (citation omitted). At common law, the term "interest," when employed in connection with a loan of money, was defined as "the compensation which is paid by the borrower to the lender, or by the debtor to the creditor, for its use." *Davis v. Rider*, 53 Ill. 416, 417 (1870). *See also Kelsey v. Murphy*, 30 Pa. (6 Casey) 340, 341 (1858) ("Interest has been defined to be a compensation allowed to the creditor for delay of payment by the debtor."); *Gaar v. Louisville Banking Co.*, 74 Ken. (11 Bush) 180, 189 (1874) ("Interest is the premium allowed by law for the use of money."). The components of interest were the amount charged, the amount loaned, and *the time* involved. "At common law, interest is the consideration or price that is agreed between the parties, to be paid for the use of money *for a stipulated time*." *County of Madison v. Bartlett*, 2 Ill. 67, 69 (1832) (emphasis added).[13]

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[13] Historically, Delaware also defined "interest," as have petitioners here, as the compensation, measured by time, for a loan of money. *See, e.g., Agostini v. Colonial Trust Co.*, 36 A.2d 33, 36 (Del. Ch. 1944). Effective June 28, 1988, by a unique statutory definition of "interest," Delaware determined for the first time that

At common law, in the event of a loan default in payment, the remedy was limited to interest or damages in the nature of interest. *See Ferris v. Barlow*, 2 Aikens 106 (Vt. 1827) ("In the case of a breach of a contract for the payment of money, the amount contracted to be paid, together with the interest from the time fixed for performance, is the measure of damages."). "Interest" payable post-default was always measured by time. *See Selleck v. French*, 1 Conn. 32, 33 (1814) ("interest will be computed from the time money becomes due.").

As recognized in *Parsons on Notes and Bills*:

> [I]f the borrower agrees to pay the sum borrowed at a time certain, or on demand, with lawful interest, and if he fails to do so, so much more by way of penalty, even if it be called extra interest, this is not such usury as would affect the contract, because the borrower has a right to pay the principal and avoid the penalty. We should say, however, that if he did not pay the principal, nothing more than that with lawful interest could be recovered from him.

2 *Parsons on Notes and Bills* 413 (1871).

B. The Common Law Treatment Of Other Non-Interest Charges

In *Young v. Godbe*, 82 U.S. (15 Wall.) 562 (1872), this Court held, "If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest *from that time* by way of compensation *for the delay* in payment." *Id.* at 565 (emphasis added).

In *Loudon v. Taxing District*, 104 U.S. (14 Otto) 771 (1881), this Court recognized this long-standing common law

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delinquency charges like late fees could be charged "as interest." *See* Del. Code Ann. tit. 5, § 945 (Supp. 1990). To take advantage of this favorable banking law, a lender intending to issue credit cards from a Delaware location must employ at least 250 persons in Delaware before it may be organized as a Delaware "consumer credit bank." *See* Del. Code Ann. tit. 5, §§ 1001-1056 (1985 and Supp. 1990). Delaware thus has chosen employment benefits over consumer protection.

principle and did *not* allow damages *except* those that were measured by time:

> It is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. *The law assumes that interest is the measure of all such damages.*

Id. at 774 (emphasis added).

"Special charges" not measured by time, like late charges, return check charges, and over-credit limit charges, were prohibited. *See New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (a party "cannot recover special damages for the detention of money due to him beyond what the law allows as interest.").[14]

Special damages, such as Greenwood's late charges, are entirely different from damages *measured over time*. They are in the nature of penalties. They do not accrue over time. Although damages measured by time were permitted at common law as equivalent to interest, flat fee penalty charges were not. *See, e.g., Gower v. Carter*, 3 Iowa 244 (1856):

> It may, therefore, be laid down as a settled rule, that no other sum can now be recovered under a penalty, than that which shall compensate the plaintiff for his actual loss. The penalty is in no sense the measure of compensation. . . . [I]t may be stated as a general rule, that a promise of paying a penalty beyond the amount of legal interest, cannot be enforced.

Id. at 253-54.

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[14] The opinion below appears to have miscited this Court when it relies on *Shoemaker v. United States*, 147 U.S. 282 (1893), and *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177 (1873), as authority for concluding that Greenwood's late fees may be "interest." (A-24, 25). In *Shoemaker v. United States*, this Court recognized that interest ("in the nature of damage") can "accrue." 147 U.S. at 321. Late fees, however, cannot accrue because they are not measured over time. Likewise, in *Brown v. Hiatts*, this Court held that "interest" and "damages" could only be charged as "allowed by law" and, therefore, did not accumulate ("run") during the Civil War when the obligation to repay the principal of a loan was suspended. 82 U.S. at 185-86. In both cases, damages, like interest, were measured by time.

At common law, Greenwood's late charges would never have been characterized as interest because they are not measured over time and are not "compensation for the use or forbearance of money."[15] Late charges are charges for a borrower's default. The charges are in the nature of special damages, *not* damages in the nature of interest, which must be measured over time. They are not "interest" in the ordinary or common law sense of the word.[16]

The First Circuit's interpretation of the term "interest," which defines the scope of federal preemption of state laws, is inconsistent with the common law meaning of the term. Because the court below did not find any Congressional intent to override this common law meaning, it should not have redefined "interest" to include delinquency charges like late fees.

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[15] Interest, of course, as recognized by the First Circuit, may be expressed as a percentage or the economic equivalent of a percentage. (A-23, 24). For example, on a $1,000 loan, a borrower may pay 10% interest or $100 interest *for a measured time period*. Whether expressed as a percentage or a dollar amount, the figure must represent *the measure of compensation per unit of time* or a "rate." The passage of time or duration of the loan is a key element of all definitions of "interest rate," just as the time of travel and the distance traveled are key elements of the definition of the rate of speed.

[16] The opinion below cites a long string of cases asserting that they stand for the principle that the charge in issue was "interest." *See, e.g., Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549 (1900) (upfront fee); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972) (upfront closing costs). (A-46). These cases, however, did *not* "decide" that the charge in issue was "interest." They only "assumed" that the charge was "interest" since *no* party argued to the contrary. The issue as to what the term "interest" means was not litigated in those courts. The court below thus overlooked the settled rule that "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985), *cert. denied*, 475 U.S. 993 (1986). Quite simply, "a statement . . . that describes a statute without purporting to resolve a disputed question is not binding when the question finally arrives for decision. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-62, 98 S.Ct. 2441, 2449-51, 57 L.Ed.2d 337 (1978)." *United States v. House*, 808 F.2d 508, 511 (7th Cir. 1986). Moreover, whether upfront charges, irrespective of the label, are in reality disguised "interest" *for a loan* is irrelevant as to whether a *post-loan* delinquency charge constitutes interest.

III. REVIEW SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT FAILED TO FOLLOW THE ANALYSIS SUGGESTED BY THIS COURT IN *MARQUETTE*, AND DID NOT REVIEW THE "LEGISLATIVE HISTORY" AND THE "HISTORICAL CONTEXT" OF DIDA OR THE NATIONAL BANK ACT.

In *Marquette*, this Court recognized that to resolve the 12 U.S.C. Section 85 statutory interpretation question, a "[c]lose examination of the National Bank Act of 1864, its legislative history, and its historical context" was required. 439 U.S. at 314. Following this analysis, the First Circuit should not have interpreted DIDA's preemption provision without considering DIDA's 1979 predecessor Act,[17] and the Senate Report that accompanied DIDA.[18]

Moreover, although the court below considered Section 85 of the National Bank Act very instructive, it failed to consider the legislative history of that Act. Once it found that DIDA's legislative history was "inconclusive" (A-41), the court should have examined the legislative history and historical context of the National Bank Act. Had it undertaken such a review, the court of appeals would have been compelled to affirm the district court.

A. The Legislative History And Historical Context Of Section 521 Of DIDA

Three months *before* the passage of Section 521 of DIDA, the 96th Congress passed Pub. L. No. 96-161[19] [the "Temporary Preemption Act"] as an interim act to be effective until March 31, 1980. The Temporary Preemption Act (the immediate predecessor to DIDA) consisted of only two Titles:

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[17] *See* Automatic Transfer Accounts – Commercial Banks, Pub. L. No. 96-161, 93 Stat. 1233 (1979), *reprinted in* 1979 U.S.C.C.A.N., Vol. 1 ["the Temporary Preemption Act"].

[18] S. Rep. No. 368, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N 236.

[19] Pub. L. No. 96-161, § 104, 93 Stat. 1233, 1234 (1979).

Title I – "Consumer Services and Usury"

Title II – "Interest Rate Amendments Regarding State Usury Ceilings On Certain Loans"

In the Temporary Preemption Act, the 96th Congress used the terms "interest" and "other charges" to denote different types of charges.[20] Under the Act:

1. Section 105(a)(1) preempted "interest" *and* "other charges on any such loan;"

2. Section 105(a)(2) preempted only "interest," *not* "other charges;"

3. Section 105(b) permitted a state to opt-out of the "interest" preemption provision on or before March 30, 1980;

4. Section 105(b) permitted a state to opt-out of the "other charge" preemption provision at any time; and

5. Title II, pertaining to other loans, preempted only state "interest" charges, not "other charges" on any such loan.

In Title One, Section 105(c) of the Temporary Preemption Act, the 96th Congress delegated to the Federal Home Loan Bank Board ["FHLBB"] the power to promulgate rules and regulations. Pursuant to this express delegation, on *January 3, 1980*, the FHLBB published 45 Fed. Reg. 1853 (1980) (to be codified at 12 C.F.R. § 590.3(b)), in which the FHLBB recognized that "interest" and "other charges" were *not* late charges, and therefore provided that a state's late charge laws were *not* preempted:

> Nothing in this section preempts limitations in state laws on prepayment charges, attorneys' fees, *late charges* or other provisions designed to protect borrowers.

12 C.F.R. § 590.3(b) (emphasis added).

In acting pursuant to its express delegation, the FHLBB concluded that the 96th Congress, when preempting state regulation of "interest" and "other charges" for a loan, did not intend to

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[20] Section 105(a)(1) read:

> The provisions of the constitution or laws of any State expressly limiting the rate or amount of *interest*, discount points, or *other charges* which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, or advance which is . . . [secured by a first lien on residential real property].

preempt state regulation of late charges. The FHLBB, in its reasoning, referred to the earlier *October 15, 1979* Senate Banking Committee Report No. 96-368 (which also accompanied DIDA):

> In addition, the regulations reflect the intention stated in Senate Banking Committee Report No. 96-368 (96th Cong., 1st Sess., October 15, 1979) that the preemption not affect limitations on prepayment charges, attorneys' fees, late charges or similar provisions in State laws designed to protect borrowers.

45 Fed. Reg. 1853.

Thus, the contemporaneous interpretation of the statute by the agency charged with promulgating regulations under the Act found that "late charges" were not within the scope of the preemption effected by either of the statutory terms "interest" or "other charges."[21]

Consideration of this pre-March, 1980 legislative history demonstrates that delinquency or late charges were not considered "interest" or even "other charges" for a loan by the 96th Congress, and were not intended to be preempted. The First Circuit ignored this legislative history. (A-49).

On March 31, 1980, the 96th Congress passed DIDA. Like the earlier enacted Temporary Preemption Act, DIDA preempts only state "interest" laws, and does *not* generally preempt laws enacted by the states to protect consumers.

In Title V of Pub. L. No. 96-221 (DIDA), the 96th Congress followed the identical pattern it had previously used in the Temporary Preemption Act, and once again recognized the difference

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[21] Significantly, at this time, Congress was well aware of the difference between "interest" and "delinquency charges," including late fees. *See, e.g., Johnson v. McCracken-Sturman Ford, Inc.*, 527 F.2d 257, 265-66 (3d Cir. 1975):

> [P]rior to enactment of the [Truth In Lending] Act, the terms "default charges" and "delinquency charges" had well established meanings in the commercial credit field and in other consumer credit legislation, *and it is certain that Congress was well aware of these definitions*. . . . . In the commercial credit field and in other consumer credit legislation, the terms "delinquency charges" and "default charges" generally refer to specific pecuniary sums that are assessed against the borrower solely because of his failure to make his payments in a timely manner. They are sums above and beyond the amount ordinarily due in the event of timely payment.

between "interest" and "other charges" for a loan and late charges for a default. *See, e.g.*, 12 U.S.C. § 1735f-7a(a)(1). It also recognized the difference, as did the FHLBB in 12 C.F.R. § 590.3(b), between "interest," "other charges," and "late charges."

In this connection, Title V includes the term "other charges" for a loan only in 12 U.S.C. § 1735f-7(a), which governs all residential first mortgages, and "late charges" only in 12 U.S.C. § 1735f-7a(c)(1). Title V then omits the phrase "other charges" and "late charges" in the preemptive provisions of Sections 511, 521, 522, 523 and 524 governing other types of loans.[22] Therefore, "late charges" are not preempted.[23]

In DIDA, the FHLBB was once again expressly given power to promulgate rules and regulations. *See* 12 U.S.C. § 1735f-7a(c)(4). In response, the FHLBB promptly reenacted its "late charge" regulation at 12 C.F.R. § 590.3(c). *See* 45 Fed. Reg. 24,113 (Apr. 9, 1980), as amended, 45 Fed. Reg. 28,306 (Apr. 16, 1980).

Congressional intent to use the term "interest" to exclude delinquency charges like late charges is also apparent in other sections of the October 15, 1979 Senate Report which accompanied DIDA. That Report referred to the "annual percentage rate" language of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, as follows:

> *In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate.* The Committee does not intend to exempt limitations on prepayment charges, attorney fees, *late charges* or similar limitations designed to protect borrowers.

S. Rep. No. 368, 96th Cong., 2d Sess. at 19, *reprinted in* 1980 U.S.C.C.A.N. at 255 (emphasis added).

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[22] Depository Institutions Deregulation & Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161.

[23] Different statutory words (*i.e.*, "interest," "other charges," "late charges") may mean the same thing if it is not apparent that Congress intended to effect a major change or to create new laws. *See Dewsnup v. Timm*, 112 S. Ct. 773, 777-78 (1992). The First Circuit stood this principle on its head when it cited *Dewsnup* for the rule that different statutory words may mean the same thing, even when such an interpretation effects a major change and creates new law.

Delinquency charges, like late charges, are *excluded* from the definition of the "annual percentage rate" in TILA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 561 (1980). Therefore, late charges, by definition, are also excluded from "interest" since "interest" is part of the annual percentage rate.

The First Circuit's conclusion that the "legislative history" and "historical context" of DIDA were "inconclusive" (A-41), is belied by Pub. L. No. 96-161 and the October 15, 1979 Senate Banking Committee Report. DIDA's legislative history shows that Congress never intended to preempt state laws regulating late charges and other non-interest charges.

B. The Legislative History And Historical Context Of The National Bank Act

While the opinion below recognized that Section 521 was modeled after Section 85, the First Circuit did not review the legislative history of the National Bank Act to determine the scope of preemption intended in that Act.[24] Had it done so, the First Circuit necessarily would have concluded that Congress used the term "interest" consistent with the common law definition of a charge measured over time for the use of money.

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[24] The court below found it unnecessary to consider the views of the Office of the Comptroller of the Currency (OCC) or the contrary views of his Staff on whether a late fee is "interest" under Section 85 of the National Bank Act. *See* the Opinion of Comptroller James J. Saxon in his June 25, 1964 letter, stating that late fees are *not* "interest:"

> Secondly, you inquired as to what charges paid by consumers for consumer credit obtained from a national bank with respect to auto financing are not considered to be interest. Charges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest. (This letter is reprinted as Exhibit A to this brief).

The OCC *Staff*, in a series of opinions commencing in 1988, disagreed. *See, e.g.*, Letter of Robert Serino, OCC Deputy Chief Counsel [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) 85,676 (Aug. 11, 1988), where Mr. Serino concluded that even a national bank's attorneys' fees in collection efforts (as well as late fees) were "interest."

The National Bank Act debates in 1864 focused on (1) whether there should be a uniform maximum interest rate, (2) whether national banks should be allowed to charge an interest rate equal to the rate allowed to any lender, or instead, limited to the interest rate permitted for state banks, and (3) whether each state should be allowed some control over the rate of interest charged by a national bank located in the state. In the course of debating those issues, it was manifest that Congress understood the term "rate of interest" to mean a charge *measured over time* for the use of money. *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1353 (1864) (Rep. Cole of California: "In California the interest is by law, where no rate is expressed in the contract, ten percent per annum.").[25]

In each and every case, the Senators and Representatives of California, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Ohio, Pennsylvania and Wisconsin considered the "rate of interest" with reference to a period of time and with reference to their own state's laws *which, without exception, also measured interest by time. See, e.g.*, 1857 Ill. Laws 45, Section 1; 1853 Iowa Laws, 4th General Assembly 67; 1843 Mich. Pub. Act No. 47; 1824 Ohio Laws 108; 1858 Pa. Laws 622; 1860 Wis. Laws ch. 202, Section 1.

No Congressional statement exists indicating that the regulation of the "rate of interest" occurs *without reference to time*. Thus, there is no indication that the 38th Congress understood "rate of interest" to include delinquency or default charges *not measured by time* and that do not even represent compensation for a loan.

The legislative history of the National Bank Act, which shows that Congress intended to preempt only state laws limiting time-based loan charges, was improperly ignored by the First Circuit. The First Circuit's opinion should have considered what the term "interest" meant at common law. It should have determined what the term meant to the 38th Congress in 1864 when it passed the National Bank Act. It should have determined whether any change

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[25] *See also* Cong. Globe, 38th Cong., 1st Sess. at 1374 (Rep. Kasson of Iowa, "In my own State, sir, we allow a rate of interest of ten percent per annum, and the banks in that State [Iowa] are allowed a rate of interest of eight percent per annum.")

in meaning was intended in 1980 when Congress used the same term to govern the scope of preemption under DIDA.

The glaring deficiencies in the First Circuit's preemption analysis are not without consequences. The consumer protection statutes of Massachusetts and numerous other states regulating non-interest charges have, in effect, been decimated under the rubric of federal preemption in a manner never intended by Congress. Hundreds of thousands of credit card holders have been and will be affected by the decision below. This Court should not leave the decision unreviewed.

CONCLUSION

For the reasons stated in the petition for certiorari filed by the Commonwealth of Massachusetts, *et al.*, and in this Amicus Brief in support of that petition, Bankcard Holders respectfully requests that the petition be granted.

Respectfully submitted,

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Dated: December 4, 1992

EXHIBIT A

JUN 25 1964

In your letter of May 22, 1964, you made three inquiries.

First, you ask the maximum interest rate that a National Bank may charge in certain specified states. Subject to certain exceptions it may generally be stated that National Banks in California, Illinois, Wisconsin and Kansas may charge interest at a rate up to ten per centum per annum, while in Illinois the normal maximum rate is seven per centum per annum.

Secondly, you inquired as to what charges paid by consumers for consumer credit obtained from a National Bank with respect to auto financing are not considered to be interest. Charges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest.

Thirdly, you requested information as to the formula used by bank examiner to convert charges to rate equivalent for purpose of determining whether the charges are at an excessive rate. Because of the inter-relation of state laws with Federal laws there is no set formula. The examiner must look at each questioned transaction with the view of uncovering any unlawful practice on the part of the lending institution. In questionable cases the problem is referred to the Law Department of the Office of the Comptroller of the Currency for review.

If you should desire any additional information this Office would be please [sic] to furnish such information upon request.

Sincerely,

(Signed) James J. Saxon

James J. Saxon
Comptroller of the Currency

Supreme Court, U.S.
FILED
DEC. 4 1992
OFFICE OF THE CLERK

(5)

No. 92-794

In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.

Petitioners,

v.

GREENWOOD TRUST COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First District

BRIEF OF *AMICI CURIAE* CONSUMERS UNION AND CONSUMER ACTION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When Congress enacted § 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831(a), which expressly preempts state limitations on interest rates that may be charged by state-chartered banking institutions, did Congress also intend to preempt all other state consumer protection legislation restricting non-interest charges and penalty fees, including late fees, that may be imposed on consumers?

2. Assuming Congress did not intend to preempt state consumer protection statutes limiting the imposition of penalty fees, did Congress intend to allow certain deregulated states, such as Delaware, to expand the preemptive scope of § 521 by creating broad, all-inclusive definitions of the term "interest."

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INTEREST OF AMICI[1]

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with approximately 5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support. Consumers Union has offices in Yonkers, New York, Washington, D.C., Austin, Texas and San Francisco, California.

One of Consumers Union's activities is to provide legislative and administrative advocacy at the national and state level on issues that affect the quality of life for consumers, including issues affecting credit and banking services. Consumers Union has a substantial interest in this litigation because the Court of Appeals' holding that § 521 of the DIDA, 12 U.S.C. § 1831d(a), preempts states' efforts to enforce consumer protection statutes against

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[1] Pursuant to Supreme Court Rule 37.2, letters expressing the written consent of the parties to the filing of this brief on behalf of *amici* Consumers Union and Consumer Action are filed herewith.

out-of-state credit card issuers will significantly impair Consumers Union's ability to advocate for state consumer protection legislation affecting credit card users in California and elsewhere.

Consumer Action is a non-profit, membership organization committed to consumer education and advocacy. The organization was established twenty-one years ago in California and currently has approximately 1600 members. As a service to consumers in California and elsewhere, the organization publishes and distributes approximately 1 million pieces of literature per year, in eight different languages, on banking, credit and utility issues, including an annual survey of bank credit card terms. In addition, the organization is actively involved in policy and legislative advocacy on credit and banking issues on behalf of consumers at both the state and national levels. Consumer Action has an interest in this litigation because members of the organization are entitled to the protection of state legislation prohibiting excessive fees and because the Court of Appeals' finding that § 521 preempts state statutory provisions prohibiting late fees will significantly impair Consumer Action's ability to lobby for consumer protection legislation in California and elsewhere.

INTRODUCTION

Consumers Union and Consumer Action submit this brief as *amici curiae* in support of Petitioner, the Commonwealth of Massachusetts ("Massachusetts"), and urge this Court to grant a writ of *certiorari*, reverse the decision of the First Circuit Court of Appeals, and decide the important issue of whether § 521 of the Depository Institutions

Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d(a), precludes states with consumer protection statutes from enforcing prohibitions against excessive penalty charges imposed by out-of-state credit card issuers.

A penalty fee is a fee, usually between $10 and $15, imposed by banks on credit card users who make a late payment, exceed their credit limit, or make a payment with a check drawn on insufficient funds. These fees are imposed by banks separate from and in addition to the interest charges imposed each month and the annual fee, which statistics show provide more than ample profits for issuers.[2] Penalty fees cost consumers over $1 billion last year, causing them substantial financial injury. Although the particular fee at issue in this case is a $10 late fee, the preemption issues raised are equally applicable to all penalty charges.

Recognizing that penalty fees can often catch consumers unaware and present a serious financial burden, a growing number of state legislatures has prohibited these fees as unfair and deceptive. In addition to petitioner Massachusetts, several other states, including Pennsylvania, Minnesota, Iowa and Maine, among others, have either limited or prohibited late and overlimit fees and are now moving to enforce these statutes against out-of-state lenders.[3] The important issue presented by this litigation

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[2] Most credit card issuers are banks. Recently, non-banking corporations, including AT&T and General Motors, have begun entering the market. Throughout this brief, the term "issuer" refers generally to both bank and non-bank issuers of credit cards.

[3] California has a more general statute that prohibits the imposition of unlawful liquidated damages on consumers. California

is whether § 521 of DIDA, which expressly preempts only state statutes limiting the *interest rate* that may be charged by state chartered banks, also preempts those state consumer protection statutes which regulate non-interest, penalty fees. In particular, the issue is whether, under § 521, banks chartered in deregulated states may "export" penalty fees allowed in their home state to consumers residing in other states where the fees are prohibited.

The First Circuit interpreted the term "interest" in § 521 broadly, holding that Respondent Greenwood Trust Company ("Greenwood") could export fees allowed by Delaware and impose them on consumers in Massachusetts. This expansive interpretation, which is not supported by either the language of the statute or its legislative history, will cause substantial injury to consumers. If not reversed, the ruling below will permit a few small states that have chosen to cater to banking interests to deregulate the industry on a national basis. Furthermore, the interpretation of the Court of Appeals below undermines state consumer protection efforts because allowing banks chartered in small, deregulated states to export penalty fees creates pressure on other states to repeal consumer protection statutes in order to retain banking and credit card-related jobs and revenues in an increasingly concentrated banking industry. As the credit card industry becomes more dominant in the marketplace and more concentrated in deregulated states, it

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Civil Code § 1671(c) and (d). That statute, as interpreted, prohibits lenders and credit card issuers from charging and retaining any sums from penalty fees that exceed the actual damages caused by a consumer's breach of the credit agreement. *See e.g. Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, 9 Cal.3d 731, 511 P.2d 1197 (1973); *Beasley v. Wells Fargo Bank, N.A.*, 235 Cal.App.3d 1383, 1 Cal.Rptr. 2d 446 (1991), *rev. denied.*

is vital that consumers receive the protection of state statutes limiting penalty charges and other unfair practices.

SUMMARY OF ARGUMENT

Consumers Union and Consumer Action, non-profit consumer organizations, urge this Court to grant a writ of *certiorari* to Massachusetts because the decision of the First Circuit, expansively interpreting the preemptive effect of § 521 of DIDA, raises important issues nationally for consumers and states attempting to enforce consumer protection legislation. Credit cards are a rapidly growing, extremely profitable industry within which consumers have limited choices and often find themselves at the mercy of card issuers. The First Circuit's holding allowing exportation of penalty fees, including late charges, from deregulated states favoring banking interests, causes substantial injury to consumers in two ways. First, the great majority of consumers already pay substantial non-market based interest charges for the use of a credit card; additional penalty fees are unnecessary and oppressive. This is particularly true because consumers generally incur penalty fees as a result of circumstances beyond their control. Second, a broad interpretation of § 521 allowing the exportation of penalty fees undermines states' legitimate efforts to enforce consumer protection legislation limiting such fees and creates pressure for state legislatures to deregulate in this area. Because of the importance of these issues and their effect on the welfare of consumers throughout the country, this Court should grant *certiorari* to determine whether the First Circuit improperly interpreted the preemptive scope of § 521 beyond that apparent in the statute, intended by

Congress, or sanctioned by this Court's recent preemption jurisprudence.

ARGUMENT

Credit cards have become an increasingly dominant segment of the American economy. Credit card lending is an extremely lucrative industry for banks and other issuers that significantly impacts on the financial welfare of consumers. The imposition of penalty fees separate from and in addition to interest charges is a growing practice in the industry, creating adverse impacts on consumer cardholders and raising issues of concern to state legislatures. The First Circuit's expansive interpretation of § 521, based neither on its language nor its legislative history, allowing the exportation of penalty fees from deregulated states, will injure consumers in two ways. First, there is the direct injury to consumers that results from the imposition of penalty fees by banks chartered in deregulated states – fees which cost consumers over $1 billion per year. In addition, there is the secondary injury that results from the erosion of consumer protection statutes in currently regulated states around the country as banks threaten to relocate their credit card operations to deregulated states in order to obtain more favorable terms.

I. ALTHOUGH THE CREDIT CARD INDUSTRY IS GROWING RAPIDLY AND IS EXTREMELY PROFITABLE, THE MARKET IS LARGELY NON-COMPETITIVE ON INTEREST RATES AND PENALTY FEES, PROVIDING CONSUMERS WITH MINIMAL INFORMATION AND LIMITED CHOICES.

The credit card industry grew at a phenomenal rate in the decade of the 1980's. In 1981, there was $31.8

billion in outstandings on bank credit cards in the United States.[4] By 1990, that figure had grown to $180.5 billion, an explosion in growth of over 560 percent. *See* Credit Card Management, *Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States,* at 26 (1992 ed). During that same time, the charge volume on Visa credit cards went from $33.0 billion in 1981 to $158.1 billion in 1990. Charge volume on Mastercards increased from $26.1 billion in 1981 to $93.1 billion in 1990. *Id.,* at 24. These increases represented an average *annual* growth in Visa and Mastercard outstanding balances of 23 and 21 percent respectively. *See* Calem, "The Strange Behavior of the Credit Card Market," *Federal Reserve Bank of Philadelphia Business Review,* at 6 (January/February, 1992). In 1991, credit cards generated approximately $34.24 billion in revenues for the banking industry and $5.83 billion in pre-tax profits. *The Nilson Report,* at 5 (Nov. 14, 1991).[5]

It is estimated that eight out of ten households in the United States currently hold one or more credit cards. The average household charged $885 per year at the beginning of the 1980's; by 1990, the average household was charging approximately $3,753 per year. *See* "The Big

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[4] The term "outstandings" refers to the amount of outstanding debt on all credit card accounts of a particular issuer at a given time. The term "charge volume" refers to the total dollar amount of purchases and services charged to an issuer's credit card portfolio for a stated duration.

[5] References to credit card profits in the banking industry do *not* include the additional profits earned by non-bank issuers of credit cards that have been entering the market in recent months.

Squeeze" *The Economist* (Nov. 2, 1991). A typical cardholder currently owes $2,350 on all of his credit cards. In 1980, that figure was only $350. *Id.* Approximately three-quarters of cardholders are borrowers who pay high-interest charges on a monthly basis (as opposed to convenience users who pay in full each month). *See* Ausubel, "The Failure of Competition in the Credit Card Market," *The American Economic Review,* at 71 (March, 1991).

This explosion in credit card growth has translated into phenomenal profits for the banking industry. In 1991, after-tax profits earned by the credit card operations of banks issuing Mastercard and Visa credit cards were estimated to be $3.5 billion. That figure was slightly lower than the $4 billion in after-tax profits earned in 1990 and the $4.11 billion earned in 1989. *See The Nilson Report,* at 1 (Nov. 14, 1991). These profits are significantly higher than the ordinary rate of return in the banking industry as a whole. In a 1991 article, Lawrence M. Ausubel, Professor of Economics at Northwestern University, demonstrated that banks issuing credit cards earned profits on their card operations of *three to five times* the ordinary rate of return in the banking industry. *See* Ausubel, "The Failure of Competition in the Credit Card Market," *supra,* at 50. The Federal Reserve Board corroborated this finding in September of 1991 in a report submitted to Congress and predicted that credit card operations would continue to earn high profits in the future. *See* Calem, "The Strange Behavior of the Credit Card Market," *supra,* at 7.

There are two primary reasons that credit card operations are so profitable for issuing banks. First, the annual interest rates charged by most issuers are currently averaging about five to six times the discount rate and federal funds rate (the rates at which banks may borrow funds

from the Federal Reserve and from other banks, respectively).[6] In 1991, of the top ten credit card issuers (measured by outstandings), which control over 50 percent of the market, eight charged an annual interest rate of 19.8 percent, including Greenwood, and one charged an even higher rate of 21.9 percent.[7] *See Card Industry Directory, supra*, at 35, 37. The *average* interest rate among the top 25 card issuers, which control over 70 percent of the market, was 18.9 percent in 1991; the average interest rate among the top 250 issuers, which control over 90 percent of the market, was 17.79 percent for that same period. *Id.* This means that most banks in the credit card market, including all of the major banks, are currently collecting interest from consumers at more than five times the rate at which the banks are able to borrow funds. *Id. See also* "Pushing Plastic Is Still One Juicy Game," *Business Week*, at 76 (Sept. 21, 1992).

The second reason credit card operations are so profitable is that the industry is generally *non-competitive* on interest rates and other pricing terms (including penalty fees), providing consumers with minimal information and limited choices. In "The Failure of Competition in the Credit Card Market," *supra*, Ausubel analyzed the cost of funds to issuing banks for the period of 1982 to 1989 and

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[6] Since July 2, 1992, the Federal Reserve discount rate in the Ninth District has been 3.0 percent; the federal funds rate for the week ending November 27, 1992 was 3.10 percent. Although some card issuers have lowered interest rates in recent months for "preferred" or "premier" cardholders, most interest rates remain in the 17 to 20 percent range.

[7] The other bank is the American Express Centurion Bank, which requires customers to pay their balance in full each month.

compared it to interest rates during the same period. He concluded that despite several fluctuations and a general decrease in the cost of funds, "[c]redit card interest rates were highly sticky during the period 1982-1989 and, in fact, were virtually constant." Ausubel, at 53.[8] Rejecting the argument that this phenomenon was attributable to an increase in the industry's rate of bad loans, Ausubel documented that during this same period credit card profits rose dramatically. *Id.*, at 57. The only explanation for the coexistence of these two market phenomena – price "stickiness" and substantial profitability – is that the competitive model of market behavior has failed in the credit card industry, leaving the industry almost entirely non-competitive on fundamental pricing terms such as interest rates and other fees. *See generally* Ausubel, *supra*. As another economist recently observed,

> Despite the large number of card issuers and the ease of entry into the industry, the performance of the bank card industry diverges from the textbook model of a competitive market. Profits have been unusually high, credit card interest rates, on average, do not move in tandem with banks' costs of funds, and card issuers engage in a significant amount of nonprice competition. Calem, "The Strange Behavior of the Credit Card Market," *supra*, at 7.

Although credit card issuers do compete, they do so by offering and advertising non-pricing frills and benefits, rather than lower interest rates and fees. "In contrast to the textbook model of competition, bank card issuers vie for customers by means other than competing on

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[8] The concept of "stickiness" means that the factor observed, interest rates, did not move in tandem with other factors as it should have.

interest rates. These firms actively engage in *nonprice competition,* which takes the form of widespread advertising and offers of special services or benefits to cardholders." Calem, *supra,* at 9 (emphasis in original).[9] Because there is little divergence among card issuers on interest rates and penalty fees, consumers find it difficult to make informed choices about their credit cards based on these pricing terms. Banks do not advertise penalty fees in their marketing, making it difficult for consumers to find out about penalty fee terms. Moreover, because most consumers do not intend to make late payments or exceed their credit limits at the time they accept a credit card, they do not compare terms or choose a credit card on that basis. Finally, because many consumers carry a sizeable outstanding balance on their card accounts from month to month, it can be difficult for these consumers to switch from one credit card issuer to another after they discover that their card issuer imposes unfair penalty fees.[10] These factors combine to leave consumers largely at the mercy of their credit card issuers.

II. PENALTY FEES ARE A PROFIT-MAKING MECHANISM THAT CAUSES CONSUMERS SUBSTANTIAL INJURY.

In a climate of extraordinary profitability and noncompetitive pricing terms, penalty fees have become yet

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[9] For example, many card-issuing banks have recently teamed up with major airlines to offer credit cards through which consumers can earn "mileage credits" that can be used for future flights, discount fares, or upgraded seating. General Motors recently launched its own credit card into the market offering consumers a rebate on any future car purchase based on total charges on the GM card.

[10] Approximately 75 percent of cardholders carry an outstanding balance from month to month. *See* Ausbul, *supra,* at 71.

another way for banks to extract profits from consumers. According to surveys published last year, over 65 percent of banks now charge late fees. That percentage is up from 50 percent in 1987 and 56.3 percent in 1988. A growing number of banks also now charge overlimit fees. The percentage of banks charging an overlimit fee increased from 32 percent in 1987 to 42 percent in 1988, and to 50 percent in 1989. *See* Stewart, "How Penalty Fees Are Rewarding Banks," *Credit Card Management*, at 39-40 (Nov., 1991). Similarly, the amount of the charges imposed has increased sharply in recent years. The average late fee for a regular Visa card shot up 22 percent, from $6.56 in 1987 to $8.03 in 1989. The average overlimit charge at the end of 1989 was $11. *Id.* The late fee charged by Greenwood, the second largest card issuer in the country, is $10. The penalty fees currently charged on regular accounts by Citibank, the largest card issuer in the country, are $15 for a late payment and $10 for an overlimit charge.

Banks have been steadily increasing their penalty fees because they are profitable. In 1991, banks issuing Visa and Mastercards collected an estimated $1.16 billion in penalty fees (late, overlimit fees and bounced check). *The Nilson Report*, at 5 (Nov. 11, 1991). This represented approximately three percent of the banks' total credit card revenues of $34.24 billion, and an increase in penalty fees of approximately 15 percent over 1990. *Id.* Penalty fees provide significant revenue, not just cost reimbursement, to issuing banks. *See* Stewart, "How Penalty Fees are Rewarding Banks," *supra*, at 39-43. In this article, the author notes that penalty fees "represent a significant revenue opportunity" that can provide revenue well in

excess of extra costs incurred as a result of late payments or overlimit activity.

> Some issuers argue they make the charges to cover extra costs incurred. But Auriemma Consulting Group Inc. looked at a broad range of nuisance fees – tariffs for card replacement and extra copies of statements as well as late payment, bounced checks and exceeding credit limits – and concluded they account for at least 60 basis points of the average bank card return on assets, up from around 30 points a few years ago.
>
> *Id.*

Class action consumer litigation filed against credit card issuing banks in California has confirmed that bank penalty fees are generally set to exceed substantially their costs. In *Beasley v. Wells Fargo Bank, N.A., supra,* 1 Cal.Rptr. 2d, at 446, an action brought under California law, after a full trial on the merits a jury awarded the statewide plaintiff class more than $5.2 million as damages for charges the bank had collected in late and overlimit fees in excess of the banks' costs incurred to collect and account for late payments and overlimit balances.[11] Similar cases against Crocker National Bank and Security

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[11] California law requires that penalty fees, which are essentially liquidated damages by virtue of the language in standard form credit card agreements, be reasonably related to the costs a bank actually incurs in collecting and accounting for late payment or overlimit balances. *See e.g.* California Civil Code § 1617(c) and (d); *Garrett v. Coast & Southern Fed. Sav. & Loan Assn. supra,* 9 Cal.3d, at 731.

Pacific National Bank resulted in settlements of $3.8 million and $2.6 million, respectively, for the statewide plaintiff classes.[12] Thus, while banks may defend their penalty fees by citing higher costs incurred directly in collection activity resulting from breach, real scrutiny reveals that, in fact, the fees charged and collected are generally far in excess of the banks' costs and are used, not to compensate for costs resulting from cardholder breach, but to provide an additional source of revenue and profit. *See Beasley v. Wells Fargo Bank, supra,* 1 Cal.Rptr.2d, at 448, 452.

While penalty fees simply represent more profits for banks, they represent a significant financial injury for consumers. Last year, penalty fees cost consumers over $1 billion. Considering that consumers are already paying substantial interest charges on delinquent and overlimit balances, an additional penalty fee of $10 or $15 is both unnecessary and oppressive. This is especially true given that consumers generally incur penalty fees as a result of circumstances beyond their control. An article reported earlier this year that one consumer in Pennsylvania, who is currently suing Citibank over its late fees, fell behind in her payments as a result of job change. Within only a few months, she had incurred more than $60.00 in late fees on her $2000 balance; these fees were *in addition to* the interest charges of approximately $30.00 per month she was already paying. *See* "Mad As Hell About Late

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[12] *Kovitz, et al. v. Crocker National Bank, et al.* (superior Court of San Francisco Case No. 868914); *McClendon v. Security Pacific National Bank* (Superior Court of Alameda County Case No. 613722-5).

Fees," *Business Week*, at 32 (Feb. 24, 1992). Because consumers can unwittingly find themselves in these situations and suffer significant financial injury, it is important that consumers be entitled to the protection of their own elected state representatives and that states be able to enforce consumer protection legislation limiting excessive penalty fees.

III. THE EXPANSIVE INTERPRETATION OF § 521 OF DIDA ADOPTED BY THE FIRST CIRCUIT INJURES CONSUMERS BY ALLOWING SMALL, DEREGULATED STATES SUCH AS DELAWARE TO SET CREDIT TERMS FOR CONSUMERS THROUGHOUT THE NATION AND BY CREATING PRESSURE ON OTHER STATES TO AVOID OR TO REPEAL CONSUMER PROTECTION LEGISLATION.

The First Circuit held that the meaning of the term "interest" in § 521, and its preemptive scope, was to be determined by looking to state law constructions of the term, specifically the construction of the term "interest" in Delaware law, the state in which respondent Greenwood is chartered. This conclusion renders the term "interest" in § 521 essentially meaningless. Moreover, because of the concentration of the market within certain mega-banks, located in deregulated states, it effectively allows these states to expand the scope of preemption in § 521 well beyond the expressed intention of Congress and to define allowable credit terms for the rest of the nation.

Certain deregulated states dominate the credit card industry. The ten largest issuers of credit cards in this country control over 53 percent of the market. Six of these issuers are located in Delaware; the largest issuer is

located in South Dakota (Citibank). *See Card Industry Directory, supra,* at 35. These two states have undertaken a deliberate strategy to attract large credit card operations by creating an extremely favorable regulatory environment. *See* "Small States Teach a Big Banking Lesson," *Chicago Fed. Letter* (June, 1986). From 1980 to 1987, credit card loans from commercial banks increased by $72.4 billion; banks located in Delaware and South Dakota accounted for over half of that increase. *Id.* In order to achieve this result, in the early 1980's, the two states repealed consumer protection legislation applicable to consumer credit card lending, passed laws favorable to banking interests, including laws allowing various non-interest fees, and undertook an aggressive campaign to entice credit card operations to relocate from other states. *Id.* The huge increase in credit card loans from these states in the following years demonstrates the success of the strategy.

If, as the Court of Appeals held below, the term "interest rate" in § 521 has no meaning other than how the home state defines it, and if all charges defined by the home state as "interest" may be exported to consumers in other states, obviously deregulated states such as Delaware and South Dakota will define any number of different charges as in the nature of "interest" on a loan. If the decision of the Court of Appeals is allowed to stand, credit card issuers located in these states can then invoke the protection of § 521 and export a variety of penalty fees, as well as other non-interest charges such as annual fees, to all other states in which they issue credit cards. This effectively allows certain small, sparsely-populated, deregulated states to set credit card terms for the entire nation. If Congress did not intend in enacting § 521 to

establish national consumer credit standards, surely Congress could not have intended that the statute operate to allow *Delaware* to define national standards (or lack thereof) for credit card lending. The states of Delaware and South Dakota have made a conscious choice to subordinate consumer interests to the development of banking enterprises; they should not be allowed to make this same choice for all consumers residing in the other 48 states. Nor should Delaware and South Dakota be able to preempt the economic and policy decisions made in this area by other state legislatures.[13]

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[13] It is well-established that regulation of lending practices for the protection of consumers is a historically-recognized power of the states. *See e.g. Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980); *Perdue v. Crocker National Bank*, 38 Cal.3d 913, 937, 702 P.2d 503 (Cal. 1985), *appeal dismissed* 475 U.S. 1001 (1986). As this Court emphasized only last term, the scope of Congressional intent to preempt such areas must be *narrowly construed*. *Cippollone v. Ligget Group, Inc.*, ___ U.S. ___, 112 S.Ct. 2608, 2617 (1992). "[T]he historic police powers of the States are not to be superseded by . . . [the] Federal Act unless that is the clear and manifest purpose of Congress." *Id.*, at 2617.

Another recent decision of this Court addressing the preemptive scope of the Employees Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), stands in stark contrast to the expansive interpretation of § 521 adopted by the Court of Appeals below. In *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1669 (1989), this court unanimously held that ERISA did not preempt a Massachusetts criminal statute requiring employers to pay employees for unused vacation time. Although ERISA has much broader preemptive language than § 521 of DIDA, preempting "any and all state laws insofar as they . . . *relate to* any employee benefit plan," 29 U.S.C. § 1144(a) (emphasis added), this Court declined to find preemption of the Massachusetts statute enacted for the protection of employees.

The interpretation of § 521 of DIDA adopted by the First Circuit further injures consumers by creating substantial pressure on states such as Massachusetts to deregulate its own consumer credit industry. This pressure arises because the interpretation of the Court of Appeals below would give banks chartered in deregulated states a financial advantage *in other states* over local banks. This disadvantages local banks in states that have consumer protection legislation to the significant advantage of the huge dominant national lenders located in deregulated states. The result is a chain reaction "race to the bottom." Banks claim they are not earning enough profit and threaten to leave states with consumer protection legislation, state legislators become concerned about losing jobs and revenues, and the legislation is repealed.

This pressure on states to repeal their consumer protection legislation caused by deregulation in other states was explained in a publication of the Federal Reserve Bank of Chicago in June 1986. The publication reported that, "after the successes in South Dakota and Delaware, other states, including those in the Seventh District, found it necessary to play follow-the-leader. Some of the banks in these states were either moving their credit card operations to South Dakota or Delaware or were threatening to do so." *Id.* The report notes that Illinois was forced

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> The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with the "separate spheres of governmental authority preserved in a federalist system."
> *Id.*, at 1675, *quoting Fort Halifax Packing Co. v. Cayne*, 482 U.S. 1, 19 (1987).

to eliminate its interest rate ceilings on credit cards in 1981; Indiana had to lift its usury ceilings in 1981 and again in 1982; and Iowa eliminated its interest rate cap and limits on annual fees in 1984 after one major bank threatened to leave. *Id.* Iowa raised its limits on late fees under similar circumstances in 1989. Louisiana and Georgia lifted all restrictions on credit card lending in 1987, hoping to attract more jobs in the banking industry. *See* "Group Advocates State Regulation of Credit Cards," *American Banker,* p. 3 (July 29, 1987). The decision of the First Circuit allowing exportation of penalty fees, as well as interest rates, will only increase this pressure to deregulate. Indeed, recently, the pressure to deregulate has focused particularly on late fees. According to a recent report in *Business Week,* "[o]n February 3 [1992], Chemical Bank persuaded New York legislators to eliminate the state's 10-day waiting period before banks can begin charging late fees. Lawmakers apparently feared that Chemical might move the Long Island card-processing operation of its merger partner, Manufacturers Hanover Co., to Delaware." *See* "Mad As Hell About Late Fees," *supra,* at 32.

In contrast, if this Court reverses the decision of the Court of Appeals, and limits the preemptive scope of § 521 to its expressed intent to preempt *interest rates,* this would eliminate the pressure on states to deregulate penalty fees. As Congress intended, banks issuing credit cards would remain subject to the consumer protection laws of the states in which the cardholders reside and would not be able to avoid restrictions on excessive penalty fees by relocating to a deregulated state. States would then be able to enforce their prohibitions against

excessive fees, whether imposed by in-state or out-of-state issuers, without fearing defections by local banks.

CONCLUSION

For all the foregoing reasons, *amici* Consumers Union and Consumer Action urge this Court to grant the petition for a writ of *certiorari* filed by Massachusetts.

DATED: December 4, 1992

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS, et al.,

Petitioners,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE OF THE STATES OF ALASKA, ARKANSAS, CALIFORNIA, CONNECTICUT, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPI, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WYOMING AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURAIE

Twenty-seven states and the District of Columbia urge this Court to grant certiorari because of the nationwide disruption of state consumer protection laws that will be caused by the decision of the Court of Appeals for the First Circuit. This decision directly challenges the states' ability to enforce laws regulating late charges in consumer credit

transactions. By interpreting "interest" expansively for purposes of preemption analysis, the decision also places in doubt the validity of every state's consumer credit laws. This unwarranted intrusion into substantive state consumer credit policy overlooks both the language and history of the federal statute at issue and the fundamental premise that a state's historic police powers can be negated only with a clear mandate from Congress.

Consumer protection and consumer credit are traditional and critical areas of state concern. The amici states, like most other states, have established comprehensive regulatory systems to ensure fairness in the relationship between consumer borrowers and their creditors.[1] These laws reflect each state's own assessment of how to balance protecting consumers with providing creditors sufficient incentive to lend profitably to their residents. These statutes are largely modern enactments; for example, nine of the amici states have adopted substantial portions of the Uniform Consumer Credit Code.[2]

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[1] Typical areas of state consumer credit regulation include limitations on interest rates, restrictions on additional fees such as late charges, licensing and periodic examinations of lenders, requirements of truthful advertising, limitations on security interests and restrictions on debt collection practices. The need for state regulation in this area has long been judicially noted. *See Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Aldens v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 466 U.S. 919 (1980).

[2] The Uniform Consumer Credit Code's stated purposes include simplifying and modernizing laws governing consumer credit, providing adequate interest rate ceilings, fostering competition among creditors to ensure access to credit at a reasonable cost, and protecting consumers against unfair practices by "some" suppliers of credit. Uniform Consumer Credit Code, 1974 Act (U.L.A.) § 1.102.

SUMMARY OF THE ARGUMENT

Greenwood Trust aspires to a credit card operation unhampered by state consumer protection laws. In the lower courts it justified its disregard of these laws by claiming that section 521 of the federal Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) preempts state limitations on late charges.[3] However, the logical extension of the respondent's argument is not limited to these charges. If the lower court's decision is allowed to stand, credit card issuers will try to rely on section 521 to eviscerate virtually all state consumer protection controls in interstate banking transactions.

DIDA cannot support this weight. Its language and history demonstrate only a careful, very narrow preemption of state interest rate restrictions, not a comprehensive de-regulatory program that preempts numerous state statutes and allows one state's laws to take precedence over the laws of all other states. The lower court's decision supporting Greenwood Trust has seriously impaired the viability and enforcement of state consumer laws. Its approach to preemption leaves open to challenge numerous state laws regulating subject matters only tangentially touched by federal legislation. The decision is incorrect as a matter of law and policy and should be reversed.

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[3] Public L. No. 96-221, 94 Stat. 132. Section 521 is codified in part at 12 U.S.C. § 1831d.

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Decision Throws the Enforcement of State Consumer Credit Laws into Disarray.

A. Background

Massachusetts prohibits the assessment of late charges on credit card accounts when consumers are delinquent in making payments. Greenwood Trust, the issuer of the Discover credit card, imposes such charges on Massachusetts residents. These charges are permitted in Delaware, where Greenwood Trust is located. Greenwood Trust bases its authority to "export" its late charge assessments on section 521 of DIDA, which, under certain circumstances, preempts state restrictions on interest rates.

Greenwood Trust's position stands or falls on how DIDA is interpreted. However, the respondent, as well as other lenders, also seek to rely on *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), as authority to export these charges throughout the country. *Marquette* held that pursuant to 12 U.S.C. § 85, national banks may use the rate of interest permitted in the state where they are located even if that rate exceeds the rate permitted in the cardholder's state.[4]

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[4] After the *Marquette* ruling several states, including Delaware and South Dakota, abolished most of their consumer credit protection laws to attract consumer lenders on the theory that creditors located in their state could "export" deregulation throughout the country. *See* "Small States Teach a Big Banking Lesson," *Chicago Fed Letter*, June, 1988; Eckman, *The Delaware Consumer Credit Bank Act and "Exporting" Interest under Section*

By artificially defining "interest" to encompass all of Delaware law, Greenwood Trust now contorts the limited preemption approved in *Marquette* as authority to export the entirety of Delaware law throughout its cardholder base and to disregard contrary consumer protection laws of the cardholder's state.[5] This effort finds no support in *Marquette,* which limited exportation simply to the rate of interest allowed by the state where a national bank is located. Nor does DIDA refer to an explicit or implicit federal policy of preemption by allowing states to set comprehensive national standards for consumer lending.

The result of the lower court's decision may be to enshrine Delaware's policy of deregulation as a nationwide policy, regardless of other state laws to the contrary. This opinion elevates not federal law but Delaware law above the laws of each state, regardless of the decisions made in this area by each state's elected representatives.

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521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 39 Bus. Law. 1264, 1264-1267 (1984).

[5] Delaware aids this effort by legislatively expanding "interest" for exportation purposes to include "all terms, conditions and other provisions" of a credit card plan for purposes of section 521 of DIDA. Del. Code Ann. Tit. 5 § 955. These terms are declared "material to the interest rate" and, pursuant to the "most favored lender doctrine," lenders seek to export them to other states as part of the interest rate. However, the definition of "interest" under DIDA is one of federal law; Delaware cannot usurp Congress' role by redefining this term.

B. The Court of Appeals' sweeping definition of "interest" threatens to engulf a substantial portion of state consumer credit laws.

This Court should review the decision below because of its nationwide effect on the consumer protection laws of the other states.[6] The repercussions are not limited to disruption of state late charge restrictions. The lower court's determination that late charges are sufficiently "related to a creditor's cost of lending" and of "processing a loan" to constitute part of the "interest rate" implies that *any* state restriction affecting the cost of lending could be preempted. App. A-25 to 26.[7]

The lower court's analysis suggests that annual fees, over-the-credit-limit fees, replacement card fees and numerous other charges could be deemed part of the "interest rate" and therefore exportable under DIDA. In addition, creditors will assert that state laws which require grace periods on credit card purchases, establish "cure periods" before accelerating a late account, and restrict the assessment of attorney's fees and collection costs all affect their economic return and cost of lending

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[6] As noted by the Petitioners, thirty-two states regulate late charges in credit card transactions. Petition, p. 13. Some states, such as Idaho, currently do not regulate this particular area. However, the right to do so effectively in the future is jeopardized by the decision below.

[7] The lower court stated: "Suggesting that an additional fee attached to a delinquent, defaulted account is related to the creditor's cost of lending that money does no violence to language, to precedent, or, indeed, to logic. Default necessarily increases the creditor's cost of processing a loan."

and could be preempted under the lower court's expansive reading of DIDA.[8] Even state laws regulating debt collection practices arguably relate to the total return of the creditor; such associated costs could thus be included within DIDA's preemptive scope.

As a result, the decision below is inimical to the enforcement of numerous state consumer credit laws as they apply to interstate banking transactions. State regulators now face substantial uncertainty over which state laws regulate terms that could be defined as part of the "interest rate" and therefore are preempted under DIDA or the National Bank Act. Regulatory and enforcement actions will be delayed and state officials hindered in their efforts to enforce these laws. State legislatures reviewing consumer credit policy cannot reliably determine the extent to which they may continue to regulate in this area, regardless of the specific problems or concerns that may exist in their states.

The uncertainty surrounding the construction of section 521 also affects consumers and lenders. Consumers pay credit card issuers hundreds of millions each year in late fees and other charges not included within the finance charge. Petition, pp. 16-17. Many of these consumers reside in states prohibiting or limiting these charges; payment of these fees transfers an enormous

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[8] This conclusion is not speculative. As noted, Delaware adopted a broad definition of "material to the interest rate" to allow lenders to export just such items. *See* Del. Code Ann. tit. 5 § 955. In the lower courts Greenwood Trust has taken the position that DIDA allows banks to impose on a nationwide basis *any* credit terms allowed by the state where the bank is located.

sum of money from consumers to lenders in violation of their states' express public policy.

While the credit card industry desires the most expansive possible definition of "interest rates" for purposes of exportation, the decision below creates substantial uncertainty for them as well. Lenders must guess as to what other charges and terms, if any, are also exportable and risk litigation should cardholders or government agencies disagree with their decisions.

In addition, the Discover credit card, as well as credit cards issued by other Delaware-based lenders, are sent to consumers throughout the country.[9] The decision below affects not just the relationship between the respondent and Massachusetts, but also other credit card issuers, millions of consumer card holders, and the consumer credit laws of all other states.

II. The Decision Below Should be Reviewed as it Improperly Preempts State Law and Misconstrues the Scope of Section 521.

A. The lower court's preemption analysis is inconsistent with decisions of this Court.

"Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic

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[9] Six of the ten largest credit card issuers are located in Delaware. In 1991 these six banks accounted for roughly 26% of the total bank card receivables. Credit Card Management, *Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States*, 1992 ed. at 35, 68-72.

police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purposes of Congress.' " *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[10] This axiom is essential to the states, as appropriate deference to state laws helps ensure that Congress supersedes state legislative enactments only through deliberate action. Principles of federalism demand no less.[11] By finding that state laws may be preempted by ambiguously worded federal laws, the lower court's opinion is incompatible with this Court's decisions.

The Court of Appeals examined section 521 and described at length its lack of clarity, specifically noting the uncertainty regarding what charges are included within the definition of "interest rate" and therefore

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[10] *See also Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991), 2481-2482; *California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-716 (1985); *New York Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.").

[11] As Chief Justice Rehnquist has emphasized: "Unless the requisite pre-emptive intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that 'the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.' " *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting) (quoting *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943)).

exportable despite state laws to the contrary. App. A-17 to 22. The Court concluded that the statutory language and legislative history were "at bottom, inconclusive." App. A-41. Nonetheless, after reaching this conclusion, the Court of Appeals erroneously proceeded to examine federal common law and state law to derive its own definition of "interest" for purposes of section 521.

The requirement that preemption be found only when the intent is clearly communicated applies equally in determining the extent or scope of express preemptive language. Construing a preemption clause broadly after concluding its language is "inconclusive" contradicts the preemption principles set out in *Cipollone*. In examining the express preemption clause in the 1965 Federal Cigarette Labelling and Advertising Act, this Court stated that the presumption against preemption properly limited the range of the analysis and "reinforces the appropriateness of a narrow reading" of express preemption clauses. *Cipollone*, 112 S.Ct. at 2618.[12] Accordingly, ambiguous terms in express preemption clauses must be interpreted narrowly and in favor of preserving state laws.

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[12] In a separate opinion joined by Justices Kennedy and Souter, Justice Blackmun concurred with the majority and noted: "The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent*. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language." *Cipollone*, 112 S.Ct. at 2626. (Emphasis in the original.)

Here, the lower court concluded that the relationship between late charges and interest rates was uncertain for purposes of preemption. The Court of Appeals should have then applied the standard clearly set out in *Cipollone* and acknowledged that the presumption against preemption eliminated the ability or necessity to conduct further review. This approach would have properly limited section 521 to its logical meaning – numerical interest rates. Instead, by forging ahead with a largely irrelevant analysis of common law usury cases and eventually concluding that the Massachusetts law was preempted, the decision misapplied important preemption principles.

Consequently, state laws regulating late charges and possibly a host of other consumer laws are now preempted for purposes of DIDA, even though neither DIDA's language nor legislative history supports this result. The decision severely damages state authority to regulate consumer credit and is unsupported by prior decisions of this Court. Further, the decision's preemption approach threatens state laws in other areas jointly regulated by the states and federal government.

B. The Court of Appeals' decision reverses the federal government's policy in consumer credit.

Examining Congress' traditional approach to regulating consumer credit helps in discerning Congress' intent in section 521. The federal role is noteworthy for its limited nature and for the deference regularly provided to state substantive law. Rarely does federal law govern the actual terms, charges and conditions of consumer credit transactions; such concerns are generally left to the

states. Rather, federal law generally preempts state law only when it offers either *less* protection or is inconsistent with federal law.

For example, the federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, regulates consumer lending disclosures but explicitly leaves intact substantive state consumer protection laws. *See* 15 U.S.C. § 1610(b).[13] Similar deference to state law is demonstrated in the Equal Credit Opportunity Act, 15 U.S.C. § 1691d(f), the Fair Debt Collection Practices Act, 15 U.S.C. § 1692n, and the Electronic Fund Transfers Act, 15 U.S.C. § 1693q. Accordingly, while section 521 authorizes a limited intrusion into the domain of state consumer credit policy by preempting state "interest rate" laws, Congress' general practice with regards to consumer credit argues for narrowly reading the scope of section 521.

DIDA's "opt-out" provisions further support a narrow construction of the Act vis-a-vis state consumer laws. In section 525 Congress permitted states to negate DIDA's preemptive effect entirely if a state legislature passed an

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[13] This section states in part: "This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit . . . . "

enactment expressing its intent to do so.[14] Senator Proxmire described the opt-out provisions on the Senate floor prior to final passage of the bill:

> The presumption [sic] of usury laws does not derogate State authority. Under the usury provisions, each State may reimpose its usury limits, if it so desires. We do not take that away from the States. They can put those usury laws back into effect.

126 Cong. Rec. 7070 (1980).

Several of the amici States have opted out of DIDA.[15] The opt-out clause demonstrates the restrained role taken by Congress in 1980 in preempting certain state usury laws and its intent that states maintain overall control in the consumer credit area. This clause also contradicts Greenwood Trust's assumption that DIDA was intended as a vehicle permitting credit card issuers to export one state's law throughout the country.

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[14] The "opt-out" provisions in section 525 were codified as notes to the relevant DIDA sections, including section 521. *See* 12 U.S.C. § 1831d (under "Effective Date").

[15] In other litigation, credit card issuers have contended that a state's "opt-out" option only applies to lenders located in the state and is ineffective against banks located in states which have not opted out. This argument was made in *United Missouri Bank, U.S.A. v. Thomas J. Miller as Attorney General of the State of Iowa*, C.A. 88-1343-E (S.D. Iowa 1988), which was settled without a resolution on the merits. Therefore, the lower court's decision is of significant concern even to those states which have opted out of DIDA.

C. The decision below incorrectly determined that "interest rates" include late charges or other terms related to the cost of lending.

The states' ability to legislative effectively to meet the needs of their citizens is significantly affected by how DIDA is interpreted. The inconsistency between the lower court's ruling and Congress' intent to narrowly define "interest" in DIDA for preemption purposes compels review of the decision.

DIDA's statutory language regarding preemption consistently modifies "interest" with "rate"; the most plausible conclusion is that preemption is limited to numerical interest rates. This interpretation is consistent with DIDA's primary purpose of removing unrealistically low state numerical interest rate restrictions during a time of significant credit shortages and high inflation. Even assuming the continuing relevance of this concern during a period of historically low interest rates, limiting DIDA to numerical interest rates rather than charges and terms "related to the creditor's cost of lending" does not contradict Congress' intent to ensure consumers have sufficient access to credit.[16]

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[16] As one court noted: "The DIDMCA [DIDA] is hardly a Congressional expression of distaste with state usury laws generally, but a compromise with the ideals of such laws – that there should be limits upon rates of interest that lenders can legally charge – in a time of crisis. Moreover, the crisis has passed. Therefore, applying the DIDMCA to any transactions other than those which it is very clearly provided are within its scope would fail to recognize the context of this law in the scheme of the inter-relationship between federal and state law." *In Re Russell*, 72 B.R. 855, 867 (Bankr. E.D. Pa. 1987)

DIDA's legislative history also confirms Congress' intent to draft DIDA narrowly to preserve state laws. In section 501, an analogous provision designed to remedy the shortage of available mortgage credit through preemption of state usury laws, Congress preempted state laws governing the "rate or amount of interest, discount points, finance charges, or other charges" assessed in connection with federally related mortgage loans. 12 U.S.C. § 1735f-7a(a). The report of the Senate Banking Committee on the bill ultimately passed as DIDA specifically limited the scope of this preemption provision to "only those limitations that are included in the annual percentage rate. *The Committee does not intend to exempt limitations on prepayment charges, attorney's fees, late charges or similar limitations designed to protect borrowers.*" S. Rep. No. 368, 96th Cong. 2d Sess. 19 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 255. (Emphasis added.)

This report corroborates that the plain meaning of DIDA is to preempt *only* restrictions on numerical interest rates. The California Supreme Court acknowledged the significance of this history for purposes of determining DIDA's preemptive reach: "Moreover, when in the 1980 Act Congress expressly preempted state usury laws, it deliberately left in effect other provisions of state law regulating charges in contracts between banks and borrowers." *Perdue v. Crocker National Bank*, 702 P.2d 503, 522-523 (Cal. 1985), *appeal dismissed*, 475 U.S. 1001 (1986).[17]

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[17] The decision below concluded that sections 501 and 521 were only "distant cousins" and therefore dismissed the relevance of section 501's legislative history. App. A-49 to 50, note

Assuming it is necessary to look outside DIDA to define "interest rates" for purposes of federal law, then the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, is directly on point. This Act exhaustively defines terms used in consumer credit transactions and clearly differentiates between interest rates and late charges. In Truth-in-Lending, "finance charges" includes "interest" as one of its components.[18] Late charges are specifically *excluded* from the definition of "finance charge." 12 C.F.R. § 226.4(c)(2). When determining the finance charge and annual percentage rate for a transaction, the lender must exclude from the calculation any late charges which are assessed. This exclusion was made even more explicit when Truth-in-Lending was amended in 1988 by the Fair Credit and Charge Card Disclosure Act. Pub. L. No. 100-583, 102 Stat. 2960. This Act established guidelines for advertising credit card plans and specified that late charges be disclosed separately from the annual percentage rate. 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a(b).

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10. The amici states believe this determination is in error. The applicability of section 501 and its history is apparent. Sections 501 and 521 were enacted as part of Title V of DIDA and address identical credit concerns. Both sections support a limited displacement of state interest rates and link the term "interest" with "rate." There is no reason why the definition of "interest" in section 501 should explicitly exclude late charges and other fees, while section 521, by implication, was meant to include them.

[18] In Regulation Z the Federal Reserve Board states that the definition of finance charges is not limited to "interest" but includes a variety of other charges, including service, transaction, activity and carrying charges, points, loan fees, assumption fees, finders fees, appraisals, and credit reporting fees. 12 C.F.R. § 226.4.

Truth-in-Lending provides the most current example of how Congress views the relationship between interest and late charges and provides a much surer ground for defining "interest" in this case than common law definitions unrelated to credit cards and modern consumer credit legislation. Limiting "interest" to fixed, numerical rates as defined in Truth-in-Lending provides a clear-cut and realistic limitation on DIDA's preemptive effect on state consumer credit laws. When the Court of Appeals found the language and legislative history of section 521 was "at bottom, inconclusive" it should have interpreted DIDA in this manner and avoided preemption of state law.

CONCLUSION

Contrary to the Court of Appeal's extended analogy, this case is not a "train wreck" involving the collision of state consumer and federal banking laws. App. A-4. Rather, the dual engines of Mass. Gen. L. ch. 140, § 114B, and section 521 of DIDA may operate on parallel tracks, at full efficiency and without crossing each other's path. Neither must yield the right of way.

For these reasons twenty-seven states and the District of Columbia respectfully request this Court to grant the Commonwealth's petition for writ of certiorari.

Dated: December 4, 1992

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al,
Petitioners,

v.

GREENWOOD TRUST COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION OF RESPONDENT

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PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION OF RESPONDENT

The Commonwealth of Massachusetts and the Attorney General of Massachusetts submit this reply to the Brief in Opposition of Respondent Greenwood Trust Company.

1. The Questions Presented are of National Importance

Respondent Greenwood's Brief in Opposition minimizes the legal and practical significance of the decision below. However, the lower court's decision effectively preempts limitations on credit card late charges in all states and seriously impairs the enforcement of state consumer credit laws. See Brief of Amici Curiae of the States of Alaska et al ("Brief of States") at 3 et seq..

Respondent downplays the legal scope of the decision below by suggesting that the decision "simply held that a late charge is 'interest' within the preemptive scope of Section 521." Br. in Opp. 13. The First Circuit's decision was not "simple."

The First Circuit endorses a rule of decision that, in effect, all home-state laws "related to" the determination of the interest rate are exportable. (App. A-25, 26). Since any law with financial significance for the lender might be considered "related to" the determination of the interest rate, there can be no question that this rule of decision limits the force of a wide variety of state consumer credit laws.

The credit card industry has shown no reluctance to challenge state authority and the decision below will weaken considerably that authority.[1/]

1/ See, e.g., Citibank (South Dakota), N.A. v. Thomas J. Miller as Attorney General of the State of Iowa, C.A. 88-258-E (S.D. Iowa 1988)(South Dakota law); United Missouri Bank, U.S.A. v. Thomas J. Miller as Attorney General of the State of Iowa, C.A. 88-1343-E (S.D.

(footnote continued)

The Respondent's brief also suggests that the Commonwealth overstates the dollar amount at stake. (Br. in Opp. at 12). The only estimate the Respondent's brief offers appears at footnote 19, where the Respondent places an upper bound on late charges of $1.7 billion, well above the estimate of $858 million which we cite.[2/]

(footnote continued)

Iowa, C.A. 88-1343-E (S.D. Iowa 1988) (Delaware law); and United Missouri Bank of Kansas City v. Thomas J. Miller as Attorney General of the State of Iowa, C.A. 88-1344-E (S.D. Iowa 1988) (Missouri law), in which foreign state credit card lenders challenged Iowa laws restricting late charges, returned check fees, attorney's fees, and changes in cardholder term requirements. These cases were settled without a judicial decision on the merits.

2/ Pet. 16, 17. Greenwood cites to The Nilson Report (November 1991) for the statement that revenues from late charges were "less than 5% of revenues" in 1991. (Br. in Opp. 13, fn. 19) Since that same Report (at 5) also

(footnote continued)

At the same time that it downplays the importance of the decision, Respondent conjures grave consequences of reversal. Greenwood speculates without support that "unfriendly legislation," aimed at federally insured banks, will grow from the hostile soil of state legislatures if this Court rightly narrows the meaning of

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(footnote continued)

indicated that credit cards generated approximately $34.24 billion in revenues in 1991, Respondent's statement means that late charge revenues were not above $1.7 billion in 1991.

Respondent also incorrectly implies that the additional interest charges allowed under Marquette, Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), dwarf the late charges at stake in the current case. Br. in Opp. 19. In fact, the charges Marquette made legal are only a portion of all interest charges (the portion in excess of the interest rate ceiling of the state of the cardholder).

"interest" to conform with Congressional intent. (Br. in Opp. 6, text and fn. 5).[3/]

2. The First Circuit's Preemption Analysis is Inconsistent with Decisions of this Court

The decision below, despite Greenwood's claim to the contrary, cannot be reconciled with the preemption principles set out in Cipollone v. Liggett Group, Inc., 112 S.Ct 2608 (1992). That the First Circuit's opinion "is replete with citations to Cippollone" (Br. in Opp. 11) reveals only an awareness of, not an adherence to, Cipollone.

Respondent asserts that the First Circuit found that Congress's "intent to

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3/ The Massachusetts law, Mass. Gen. Laws Ann., ch. 140, §114B (West 1991), like other modern consumer credit legislation, regulates evenhandedly. The Commonwealth does not seek an upper hand vis-a-vis federally chartered or out-of-state lenders; it simply seeks to enforce its consumer protection laws consistently.

displace state law is clear." (Br. in Opp. 11). However, the First Circuit went on to find explicitly the absence of clear intent by Congress to preempt late charge laws. It stated that "DIDA's text and legislative history are, at bottom, inconclusive" as to the meaning of "interest" and "interest rate." (App. A-41). Its preemptive holding was founded on a line of usury (not preemption) cases. These cases were shaped by a judicial desire to support law enforcement of usury laws; they do not stand for the proposition that late charges are "interest," only that some loan charges should be computed-in along with percentage interest for the purpose of applying usury laws (to prevent circumvention of those laws). By contrast, in this case, "interest" must be narrowly construed so

as to comply with the clear statement requirement for preemption.

The intent to preempt must be clearly communicated in determining the scope of express preemption. See "Brief of States" 8-11. Cipollone stands for the proposition that even in an express preemption case, a court must find against preemption in cases where the borders of the scope of preemption are not clear. In Cipollone, this Court stated that the presumption against preemption "reinforces the appropriateness of a narrow reading" of express preemption clauses. Cippollone, 112 S.Ct. at 2618.[4/]

4/ In a separate opinion joined by Justices Kennedy and Souter, Justice Blackmun underlined this narrow reading: "We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language." Cipollone, 112 S. Ct. at 2626.

The court below explicitly found no intent to preempt late charge regulation in Congress' language. Its finding that state law charge laws may be preempted by ambiguous federal law is incompatible with this Court's preemption decisions. See Pet. 30-35.

3. The First Circuit's Decision is Not Compelled by Marquette

Greenwood insists that the decision below follows inexorably from Marquette, supra. (Br. in Opp. 12-13). Although Marquette speaks to the definition of the term "located" in Section 85 of the National Bank Act (12 U.S.C. 85), it is completely silent on the meaning of the term "interest."

More generally, Respondent portrays Marquette and DIDA as creating a "level playing field" for the various players in interstate banking by allowing banks

competing in multiple states to avoid the complexity of differing regulatory regimes. (Br. in Opp. 4-6, 11). This mischaracterization became an important policy rationale for the broad preemptive holding of its decision. (App. A-51). In fact, as developed in our Petition, banks have always worked within a regime of multiple regulation. (Pet. 35-42).

Greenwood specifically asserts that "forcing credit card issuers to vary their late charges by state to comply with disparate state laws would engender the very confusion Marquette sought to avoid" (Br. in Opp. 11). In fact, Marquette avoided a different "confusion". Marquette held that a national bank is "located" only in its home state for the purpose of applying

Section 85. Marquette 439 U.S. at 313.

> "If the location of the bank were to depend on the whereabouts of each credit card transaction, the meaning of the term 'located' would be so stretched as to throw into confusion the complex system of interstate banking". Marquette, 439 U.S. at 312 (emphasis added).

Asking banks to comply with the late charge laws of the cardholder's home state is far less confusing than requiring that every card transaction be governed by the law of the state in which it occurs.

Respondent also suggests that the Commonwealth is making a policy defense of state usury laws weakened by Marquette. (Br. in Opp. 15). To the contrary, we explicitly accept the holding of Marquette as it applies to state interest rate laws (but reject Respondent's attempt to extend it to late charge laws). (Pet. 41).

Marquette did not impute to Congress an intent to create a uniform scheme of regulation under the guise of section 85 of the National Bank Act. Nor did it sanction the preemption of state laws other than percentage interest rate restrictions. To the extent that Greenwood seeks to further this policy concept, it should address itself to Congress. See Marquette, 439 U.S. at 319. It is Greenwood, not the Commonwealth, that is seeking a judicial revision of Congressional policy.

4. DIDA Does Not Preempt Late Charge Laws

Respondent states that "Courts have long recognized the need to construe 'interest' . . . to effectuate the 'most favored lender' doctrine." (Br. in Opp. 5). The Commonwealth agrees.

Similarly, Respondent characterizes as a concession and emphasizes our acknowledgement that "in usury cases, courts must include as interest some fees and charges associated with loans." By reviewing case law on these points at length, Respondent is, in a self-serving way, defining incorrectly the issue at hand. This is not a most-favored-lender case, nor is it a usury case. Massachusetts late charge law applies to all lenders, foreign and domestic, and Massachusetts is not attempting to apply usury law to restrict Respondent's overall economic returns from its loans. (Pet. 13-15).

Greenwood responds to these fundamental distinctions by asserting that "If Greenwood's late charge 'must' be treated as 'interest' under Section

521 for usury purposes, it must likewise be considered 'interest' under Section 521 for preemption purposes." (Br. in Opp. 9). (It is important to note that the Commonwealth does not concede that late charges as opposed to some other charges, must be treated as interest under Section 521 for usury purposes. Pet. 42-49.) The clumsy simplicity of respondent's assertion misconstrues the Commonwealth's argument and ignores fundamentals of legal reasoning. In the words of Justice Holmes:

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the times in which it is used."

Towne v. Eisner, 245 U.S. 418, 425 (1918). "Interest" is undoubtedly one of the fundamental concepts of finance,

and like all fundamental concepts does apply differently in different contexts. Many fundamental legal concepts have been found to have this "protean" quality.[5/] There is nothing incongruous about construing the term "interest" broadly in doing usury computations and narrowly in deciding preemption issues. In fact, Cipollone, supra, compels this.

Respondent asserts that the legislative history of the recodification of Section 522 of DIDA in

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5/ See, e.g., references to protean qualities of "implied preemption" (decision of First Circuit at App. A-13, citing French v. Pan Am Express, 869 F.2d 1, 2 (1st Cir. 1989); "jurisdiction" (Sweeney v. Westvaco Co., 926 F.2d 29, 40 (1st Cir. 1991); "fraud" (United Electrical Radio and Machine Workers v. 163 Pleasant Street Corp., 960 F.2d 1080, 1093) (1st Cir. 1992); and "good cause" (U.S. v. De Jongh, 937 F.2d 1, 5 (1st Cir. 1991).

1989 may be read as confirming the position that late charge regulations are preempted by Section 521. (Br. in Opp. 14, 15). This asertion is wrong for three reasons: (1) The passage cited does not broaden the meaning of the term interest to include "loan related charges." The Respondent clips the passage, which in its entirety, refers to preemption only where state law prescribes a rate below a specified numerical percentage rate defined with reference to the rates on 90 day commercial paper. See Appendix. (2) In the words of the Respondent at Br. in Opp. 15, "DIDA was a hodgepodge of diverse and unrelated provisions . . . [and] "there is no evidence that Congress intended 'interest' to have a single meaning throughout all of Title V

of DIDA." (3) The case law cited by the respondent as to the general relevance of the authority offered is inapposite.[6/]

Greenwood also asserts that the First Circuit's opinion is merely one decision "in a long and unbroken line of decisions that uniformly have held a wide variety of fees and charges to

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6/ In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, later modification of the statutory language itself was used to understand the original intent of the statute. In the Respondent's brief, the authority offered is not statutory language but legislative history (and of a different statute).

Similarly weak is Respondent's argument that Congress was aware of, but chose to condone, the violation of state late charge laws by interstate credit card companies. In Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978), unlike the present case, where Congressional inaction was taken as an endorsement of an industry practice, Congress had held repeated hearings on the subject at hand.

constitute 'interest' ..." (Br. in Opp. 3). That representation is misleading because it suggests that all fees and loan related charges may be fairly characterized as "interest."

The critical factor in distinguishing between "interest" and "late charges" is not the label of the charge, but the substance of the transaction. Greenwood ignores the clear distinction between upfront charges and default charges. Upfront charges, imposed at the inception of the loan as compensation and a condition for the loan itself, fall within longstanding definitions of "interest." Default charges, imposed only upon default, are avoidable, or are contingent on the performance of the borrower; they are not compensation for

the loan. Greenwood's late charges are contractual default charges; they are not "interest." Greenwood has not cited any pre-1992 case holding under Sec. 521 of DIDA or Sec. 85 of the National Bank Act that a single sum late fee or other default related fee should be included in the calculation of "interest."[7/]

7/ In fact, in the only pre-1992 case cited by Greenwood where the court considered a lending charge that was not charged upfront (prepayment charge), the parties assumed that the charge was not "interest" because the payment of the charge was within the control of the borrower. See Northway Lanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855, 864 (6th Cir. 1972) (Br. in Opp. 6-7).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

H.R. Rep. No. 54 at 343
(101st Cong., Sess., pt 1) (1989)

This section provides that a savings association may take, receive, reserve, or charge on any loan, note, bill of exchange, or other evidence of debt, interest at the greater of (1) a rate not more than one per centum in excess of the discount rate on ninety-day commercial paper in the specified Federal Reserve Bank where the institution is located, or (2) the rate allowed by the laws of the State where such institution is located. If such rate exceeds the rate that would be permitted in the absence of this section, such rate may be employed notwithstanding any State constitution or statute concerning loan related charges, which is thus preempted. The effect of this section is to preserve the current preemption of state usury laws.

No. 92-794

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.,

Petitioners,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE OF THE AMERICAN CONFERENCE OF UNIFORM CONSUMER CREDIT CODE STATES AND THE NATIONAL ASSOCIATION OF CONSUMER CREDIT ADMINISTRATORS IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE OF THE AMERICAN CONFERENCE OF UNIFORM CONSUMER CREDIT CODE STATES AND THE NATIONAL ASSOCIATION OF CONSUMER CREDIT ADMINISTRATORS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The American Conference of Uniform Consumer Credit Code States (ACUCCCS) and The National Association of Consumer Credit Administrators (NACCA)[1]

[1] On November 23, 1992 the National Association of Consumer Credit Administrators voted 20-9 (with 2 abstentions) to join this *amici* brief in support of the Petition for Certiorari of the Commonwealth of Massachusetts. Voting in favor were consumer credit administrators from Alabama, Colorado, Connecti-

solicit this Court to grant certiorari because of the destruction of longstanding state consumer protection laws imposed by the preemptive decision of the Court of Appeals for the First Circuit. This decision takes from the states their ability to enforce laws relating to late charges in consumer credit transactions and in one broad stroke expands the ability of credit card issuers to circumvent the substantive consumer credit laws of the states within which they are doing business.

ACUCCCS is an association of states which has adopted in full or substantial part the Uniform Consumer Credit Code in either its 1968 or 1974 versions. Its membership includes Colorado, Indiana, Iowa, Kansas, Maine Oklahoma, South Carolina, Wisconsin and Wyoming. NACCA is a professional association of state consumer credit regulators whose purpose is to improve the supervision of consumer credit laws.

The Amici emphasize that their involvement in this litigation does not represent a condemnation of either credit card late charges or the states who have chosen to

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cut, Iowa, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina (Consumer Finance Division), South Carolina (Department of Consumer Affairs), Texas, Wisconsin, Wyoming and Puerto Rico. Voting against were members from Arizona, Indiana, Kansas, New York, North Carolina, Ohio, Oregon, Virginia and Washington. Regulators from Idaho and Nebraska professed neutrality. A majority of association members also supported the Commonwealth in the two lower court proceedings.

deregulate this area. Some ACUCCCS and NACCA member states allow late charges in open end credit transactions. To the contrary, the Amici seek to uphold the authority of each state to consider, enact and enforce consumer credit laws based on its own economic conditions, and tailored to the needs of its own creditors and consumers. Therefore, it is not Delaware law the Amici object to, rather, it is the application of Delaware law to consumers located in other states who have no representation in Delaware's legislature. These consumers depend upon their own legislatures to implement consumer credit policies that will ensure sufficient availability of credit, place all lenders on an equal competitive footing within the state, and also fulfill the traditional state function of protecting consumer borrowers. These interests are directly jeopardized by Greenwood Trusts's attempt to "nationalize" Delaware law and ignore the consumer credit laws and policies of every other state.

The Amici raised its concerns in this matter at the U. S. District Court and First Circuit and those concerns continue. The expansive definition of interest adopted by the lower court's opinion could result in states losing control over substantive provisions of their consumer protection laws and the inherent police power associated with those laws.

SUMMARY OF THE ARGUMENT

Greenwood Trust through its Discover Card has created a nationwide credit card business. By initiating this action, Greenwood Trust hopes to undermine under the

guise of federal preemption the traditional authority of the state to regulate consumer credit laws. What the Greenwood Trust argument and the decision of the First Circuit fail to understand is that DIDA[2] does not grant such omnipotent authority to a credit card business to avoid state regulation and incorporate other charges into the term "interest". Rather DIDA narrowly addresses the issue of interest rates and preemption of state laws.

The First Circuit's decision also implicitly recognized the propriety of characterizing late charges as a component of the interest rate under the National Bank Act. This dependence on the National Bank Act is misplaced. It only permits national banks to "export" the interest rate of the state where the bank is located; it does not authorize a national bank to assess other charges or terms not permitted by the consumer's home state.

The First Circuit's decision has set up a situation requiring state by state challenges from either the credit card industry or the states themselves to get a clear reading on the status of state law with respect to various credit card terms and charges.

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[2] The Depository Institutions, Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Tit. V. Part C § 521, 94 Stat. 132, 164 ("Section 521").

REASONS FOR GRANTING THE PETITION

I. The Decision of the First Circuit Ignores the Opt Out Provision of DIDA.

When Congress passed DIDA it allowed the states to opt out of the statutory preemption of state usury laws.[3] A number of the Amici states took advantage of the opt out provisions and have overridden all or portions of the preemption.[4]

This option demonstrates that Congress intended to create a narrow window of preemption leaving to the states the opportunity to refuse coverage under DIDA and reestablish their own laws. The entire concept of "opt out" denotes a deference to states' rights and a recognition of the substantive laws protecting consumers that have been initiated by the states. By its actions Congress explicitly recognized that citizens of Wisconsin, for example, should be afforded the consumer protections provided by the laws of the state in which they live. Congress recognized this when Wisconsin's own Senator William Proxmire discussed the ramifications of "opt out" provisions during debate on the Senate floor prior to the law's passage:

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[3] The "opt out" provision to 12 U.S.C.A. § 1831d was codified in the History; Ancillary Laws and Directives at that section under the heading Effective date and application.

[4] Examples of states taking advantage of the preemption include Colorado, Colo. Rev. Stat. Sections 5-13-101 through 105; Maine, Me. Rev. Stat. Ann. tit. 9-A, Sections 1-110; South Carolina, 1981 S.C. Acts 6 Section 3 and 1982 S.C. Acts 385 Section 1; Wisconsin, 1981 Wis. Laws Ch. 45 Section 50.

> The presumption [sic] of usury laws does not derogate state authority. Under usury provisions, each State may reimpose its usury limits, if it so desires. We do not take that away from the States. They can put those usury laws back into effect. 126 Cong. Rec. 7070 (1980).

The "opt out" provision recognizes that a state has a right to control its own destiny in the protection of consumers and that no other state has a right to impose its legislative philosophy on another.

It is inconceivable that Congress would not have enacted Section 525 enabling the states to override usury preemption and on the other hand enacted Section 521 in the same part of the same title, intending it to allow states to have a free hand to define "interest rate" so as to reimpose the very terms on other states that had opted out.

II. "Interest" Does Mean Numerical Percentage Rate and is not an All Encompassing Term.

The First Circuit holding has concluded summarily that DIDA's use of the term "interest" buttressed by selected dictionary definitions, means more than "interest." To the court "interest" now means late fees and possibly overlimit fees, NSF check charges and virtually any other theory a credit card issuer can concoct to rationalize how it sets its annual percentage rate.

This expansive definition violates Congress' intent. In DIDA the word "interest" was consistently modified by the word "rate". The states recognize this fact. Since

the inception of DIDA states that have wanted to incorporate other fees into their definition of "interest" have noted the need to pass legislation to do so. This includes the state of Delaware, home of Greenwood Trust.[5] Since the term "interest" by itself could not include other charges and terms, some states have redefined the term for their own purposes.

Consequently, the lower court's decision jeopardizes the dual system of banking which has operated in various forms since the beginning of the United States. In contrast, Congress has historically adopted a conscious policy of "equalization" acknowledging the authority of each state to design the permissible structure for banks, whether state or nationally chartered which were domiciled in the state.[6] The states have individually made determinations on what interest rates and additional charges could be assessed.

These choices go to the states' capacity to determine how the financial industry will affect its citizens and what rights, protection and responsibilities will be afforded to both industry and the citizenry. The dual

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[5] States that have incorporated other charges into their definition of "interest" since the advent of DIDA include: Del. Code Ann. tit. 5, §§ 945, 955 (1988); Ohio Rev. Code Ann. § 1107.262 (Baldwin 1991); La. Rev. Stat. Ann. § 6:548 (1990); Ga. Code Ann. § 7-5-4 (1990).

[6] See Federal Reserve Act of 1913 (Act of Dec. 23, 1913, Ch. 6 Stat. 251); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 564-65 (1934) which noted incorporation of state law into the National Bank Act as the standard for regulating national banks to ensure competitive equality.

banking system has been defended as representing Federalism in practice by providing flexibility to the states and encouraging experimentation and innovation at the state level.[7] Furthermore the dual system provides "checks and balances against over-regulation by a single monolithic regulatory body.[8]

The First Circuit decision does not adequately recognize how this country's dual banking system is rooted in concepts of federalism and state sovereignty. For example, the lower court's reliance on the National Bank Act is misplaced. In addition, the National Bank Act was enacted 116 years before the statute at issue. The purpose behind the two differ significantly. Congress' intent in the 1860's to set up a unified currency system and prevent discrimination against national banks is vastly different from Congress' attempt in 1980 to resolve a credit availability crisis.

Even assuming for the moment that DIDA allows state chartered institutions all of the same rights as the National Bank Act, Congress never intended for contractual terms such as late charges to be exportable as a component of the "interest rate." In Section 501, a companion provision to Section 521, the clear and unequivocal legislative history dealing with usury law preemption in mortgage loans shows that Congress did not intend to

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[7] See, Note, *The Federal Bank Commission Act: A Proposal to Consolidate the Federal Banking Agencies,* 25 Clev. St. L. Rev. 475, 478-492 (1976).

[8] *Id. See Also* Golembe, *Our Remarkable Banking System,* 53 Va. L. Rev. 1091 (1967).

preempt through DIDA the States' ability to limit late charges:

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charge, attorney fees, late charges or similar limitations designed to protect borrowers.
>
> S. Rep. No. 368, 1st Sess. 19 (1979), reprinted in (1980) U.S. Code Cong. & Admin. News 236, 255.

Beyond this clear indication of Congressional intent in DIDA, the characterization of late charges as a component of the interest rate is totally inconsistent with 12 U.S.C. § 85.

The clear language of that section of the National Bank Act indicates that in transactions other than business or agricultural loans, a national bank has a choice between the rate allowed by the laws of the state or territory or a rate of one percent in excess of the discount rate on ninety-day commercial paper available at the Federal Reserve bank in the national bank's district. The penalty provisions in 12 U.S.C. § 86, based on traditional state usury penalties, imply that a maximum as between the two alternative rates exists, the violation of which leads to the federal usury penalty of the forfeiture of all interest provided for as well as a return of twice the amount of interest already collected. Numerous cases

establish that banks must calculate the correct maximum rate or face liability.[9]

Moreover, Congress gave national banks alternative rates so that the higher of the rates be considered the rate maximum. A fortiori, Congress also intended that a national bank should be reasonably able to determine which of the alternative rates were higher, and likewise, how to calculate them.

If contractual terms such as late charges can properly be considered a component of the interest rate, this would be true whether or not there were affirmative limitations on the interest rate. In any event, States such as Delaware and South Dakota have attempted to legislate not only that rates are unlimited, but that many other contractual terms are part of the interest rate.[10]

Nevertheless, unless a state resorts to the expedient of totally deregulating rates and terms, national banks are

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[9] See e.g. *Citizens National Bank v. Donnell*, 195 U.S. 369 (1904); *Lake Benton First National Bank v. Watt*, 184 U.S. 151 (1902); *Partain v. First National Bank of Montgomery*, 467 F. 2d 167 (5th Cir. 1972).

[10] States such as Delaware and South Dakota have the right to deregulate rates for their own citizens and the Amici do not dispute this right. By the same token, their populations are relatively small, and their laws are designed to maximize the extra-territorial effect of their laws on the citizens of other States through exportation. In the same title Delaware attempts to minimize the effect card issuing banks could have on local competition by limiting other areas of banking activity. See Del. Code Ann. tit. 5, §§ 1001-1056 (1983). See also *Independent Comm. Bankers Ass'n. of South Dakota v. Bd. of Governors of the Federal Reserve System*, 838 F. 2d 969 (8th Cir. 1988).

exposed to liability under 12 U.S.C. § 86 if they calculate incorrectly.

Unlike origination charges or other prepaid finance charges which may be calculated into the annual percentage rate so that it may be expressed as a numerical rate (as is specifically recognized in the Truth in Lending Act at 15 U.S.C. §§ 1605 (a)(1) and 1606), late charges are necessarily unknown at the time the loan is consummated. Thus, a fixed interest rate which considered late charges as a component would be rendered incalculable, both because of the inability to determine in advance how many late charges might be paid and because of the inability to compare the "most favored lender rate" with the federal discount rate set forth in 12 U.S.C. § 85 to determine which is actually higher.

III. The Decision of the First Circuit Incorrectly Preempts the State Police Powers.

If late charges amount to interest rates, then other charges and other substantive provisions may be so considered. Indeed, Greenwood Trust urges, and the First Circuit appears to hold, that other consumer protection statutes may be preempted to the extent that the consumer protection affect the creditor's bottom line, its "cost of lending." (App. A-25). Examples could include attorney fees, default charges of all sorts, garnishment protection provisions, prepayment penalty restrictions and so forth.

Moreover, it appears that even if such terms would not ordinarily be regarded as within the definition of interest rate, a card friendly state legislature is free to

characterize them as interest rate components. Suppose in State X credit card exporting banks decide it is an inconvenience to send notices and comply with the debt collection restrictions of the other states in which its customers live. Suppose further that it prevails on the legislature of State X to define interest rate to include debt collection procedures. Lenders may use the expansive definition adopted by the lower court to argue they now have the right to ignore state law regulating collection practices.

To use the First Circuit's analogy, the train which it has put on the tracks has no brakes, and there is no predicting how far it will go down the tracks preempting state consumer protection laws. The concerns of the Amici are not fanciful or abstract. Using the "exportation" theory, creditors have already refused to comply with Amici state laws in the following areas:

1) Private label cards (merchant credit cards, issued in the name of and with the logo of the merchant, nominally financed or serviced through an out of state bank);

2) Tax refund loans (electronically filed tax returns are prepared and/or brokered by local merchants, but an out of state bank is the source of the funds);

3) Secured card scams (credit cards secured by a deposit in an out of state bank, aimed at persons with bad credit, and in which the profit is made by excessive fees and charges assessed outside the annual percentage rate); and

4) Vehicle manufacture card (credit cards issued by a vehicle manufacturer's captive national bank).

It is difficult to imagine a form of consumer lending that a creditor could not allege some nominal connection with a federally insured bank such that preemption could be claimed. The difference between a vehicle manufacturer's credit card and typical dealer financing by assignment to the manufacturer's acceptance company is essentially a difference in form only.

If the First Circuit's construction of Section 521 is correct, Congress could have simply decreed that "no state shall make any law restricting the rates or terms of consumer credit." However, Congress did not do so. Given Congress' extensive efforts in DIDA to show deference to states' regulatory authorities, this was clearly not Congress' intent.

The First Circuit seems bent on beginning with an assumption that there is in fact federal preemption in this case. The First Circuit ignores the beginning of the analysis of whether there is preemption. The Court has stated when considering preemption, "we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was made the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The First Circuit would have been better served to follow the words of Justice Blackmun who stated:

> The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent*. *Cipollone v. Ligget*

Group, Inc. 112 S. Ct. 2608, 2626 (1992) (concurring in the judgement in part, and dissenting in part) (emphasis in the original).

The effect of the First Circuit's decision on the states' longstanding and recognized role in consumer credit is particularly troublesome to the amici who are charged with regulating credit transactions and protecting consumers.[11]

If the First Circuit decision is allowed to stand, consumers could be subject to the whims of creditors in foreign states. This is not just conjecture. There has been at least one case filed in the credit card issuer's home state against an out of state cardholder for being in default according to the laws of the state of the card issuer rather than the state of the cardholder.[12] The cardholder was not to be afforded the protections of his home state's substantive consumer protection and credit laws. The Amici strongly believe that Congress did not intend this result. State residents deserve the protection of their own state's laws and should not be generally subject to the laws of other states whose only protections are those offered to the credit card industry.

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[11] See *Aldens, Inc. v. Packel*, 524 F. 2d 38, 46 (3d Cir. 1975), *cert. denied*, 425 U.S 943 (1976); *Griffith v. Connecticut*, 218 U.S. 563, 568-569 (1910); *General Motors Corp. v. Abrams*, 897 F. 2d 34, 41-42 (2d Cir. 1990); *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F. 2d 1315, 1319 (2nd Cir. 1990), *cert. denied* 111 S. Ct. 1122 (1991); *Chrysler Corp. v. Texas Motor Vehicle Com'n*, 755 F. 2d 1192, 1205 (5th Cir. 1985).

[12] *Bank One Columbus NA v. Kerry L Dutton 2104 Piedmont Road, Eau Claire, Wi. 54703* M 9110CVF-037052 (Franklin County, Ohio Municipal Court 1991).

CONCLUSION

The train the First Circuit mentioned is a runaway which has lost all recognition of stopping at the station of states' rights. The different states laws are not inconsistent with the federal law. The state laws may be inconsistent with each other, however, Congress did not intend and federal law should not be used as a mechanism to preempt one state's laws at the expense of another.

For these reason ACUCCCS and NACCA respectfully request this Court to grant the Commonwealth's petition for writ of certiorari.

DATED: December 4, 1992

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